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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1332

CITY OF VANCEBURG, KENTUCKY - Petitioner

VERSUS

**FEDERAL ENERGY REGULATORY
COMMISSION** - Respondent

SUPPLEMENTAL APPENDIX (Joint Appendix Pagination Included)

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[1]
UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

LICENSE (MAJOR)

Before Commissioners: RICHARD L. DUNHAM, *Chairman*;
DON S. SMITH, JOHN H. HOLLO-
MAN III, and JAMES G. WATT.

CITY OF VANCEBURG, KENTUCKY } Project No. 2245

ORDER ISSUING LICENSE (MAJOR)

(Issued March 29, 1976)

Harrison County Rural Electric Membership Corporation (HCREMC) of Corydon, Indiana, filed on September 7, 1961, and supplemented on December 12, 1969, and February 9 and October 14, 1970, an application under Section 4(e)¹ of the Federal Power Act (Act) for a major license to authorize the construction, operation and maintenance of the proposed Cannelton Project No. 2245, to be located at the U. S. Army Corps of Engineers (Corps) Cannelton Locks and Dam on the Ohio River. The Commission, by order issued September 8, 1971, authorized the substitution of the City of Vanceburg, Kentucky (Vanceburg or Applicant) as the applicant for the project. On November 1, 1972, January 8 and August 21, 1973, and June 6, 1974, Vanceburg supplemented the application.

Applicant proposes to construct a powerhouse, with an installed capacity of 70,560 kW, and appurtenant facilities in Hancock County, Kentucky, near Hawesville, Kentucky,

¹16 U.S.C. §797(e).

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and Cannelton, Ohio. The project will be located on the Ohio River at the Cannelton Locks and Dam, 720.7 river miles below Pittsburgh, Pennsylvania. The project will affect lands of the United States, will be located on a navigable waterway of the United States, and will utilize the surplus water or water power from a Government dam within the meaning of the Act.

The Cannelton Project No. 2245 will be constructed on the Kentucky side of the Ohio River, and will include a concrete powerhouse, to be constructed in an excavated channel, containing three submerged bulb-type Kaplan hydroelectric generating units with a total installed capacity of 70,560 kW;

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a bridge connecting the powerhouse to an access road south of the project in Kentucky; an earthen dam with a top elevation of 388 feet mean sea level (m.s.l.) between the Corps' Cannelton Dam and the powerhouse; and other appurtenant facilities more fully described hereinafter.

Vanceburg will use the power generated at the project to meet its load requirements and will sell all power from the project, surplus to its needs, to East Kentucky Rural Electric Cooperative Corporation of Winchester, Kentucky (EKRECC), in accordance with a Memorandum of Agreement dated February 18, 1970, as amended February 1, 1972, and filed as part of Exhibit U on January 8, 1973. Vanceburg will construct two single-circuit transmission lines extending 2.8 miles southwest to deliver power to Big Rivers Rural Electric Cooperative Corporation's (Big Rivers) existing 161 kV Coleman-Hardinsburg transmission line. Big Rivers has negotiated an agreement with EKRECC to interconnect their systems through the transmission system of Kentucky Utilities Company. Pursuant to this agreement and the agreement between Vanceburg

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and EKRECC, power from the project will be delivered to EKRECC and Vanceburg over the 138 kV transmission line to be built for the Greenup Project No. 2614. The marketing of power from the project and issues related thereto are more fully discussed hereinafter and in the Order Issuing License (Major) and Dismissing Application for Preliminary Permit for the Greenup Project No. 2614.

Notice of the application was originally issued on September 7, 1962, with October 22, 1962, as the last date for filing protests or petitions to intervene. No protests, notices of intervention, or petitions to intervene were filed in response to this notice.

In accordance with the Commission's order of September 8, 1971, *supra*, notice of the application was given on September 8, 1971, with November 15, 1971, as the last date for filing protests or petitions to intervene. On June 7, 1974, the Kentucky-Indiana Municipal Power Association (KIMPA) submitted an untimely petition to intervene. By order issued December 4, 1974, the Commission accepted the petition for filing and granted the intervention.

By letter dated June 8, 1970, the Corps recommended that studies in connection with the project be coordinated with the District Engineer, Louisville District, Corps of

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Engineers (District Engineer). These studies, stated the Corps, should include the effect of the powerhouse location on a proposed future lock, modeling studies of the interrelationship of the hydroelectric plant axis and the dam axis in order to minimize the effects of hydroelectric plant discharges on navigation, the effects on navigation of the use of water above or below the normal navigation pool for peaking power purposes, the coordination of construction schedules, the need for communication and control facilities to ensure coordinated operation of power and navigation

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facilities, and compatible architectural styles for power and navigation facilities. The Corps also stated that Applicant should provide for cutoffs under the powerhouse to prevent possible loss of the navigation pool, and that the height of the earthen dam between the powerhouse and the Corps dam should be limited to elevation 388 feet m.s.l. Corps and Commission approval of project structures is provided for in Articles 45 and 46 of the license.

The Corps recommended that Articles 5 through 9 inclusive of Standard Form L-6 be included in the license. *See Form L-6: Unconstructed Major Project Affecting Navigable Waters and Lands of the United States*, 34 F.P.C. 1114 (1965). Revised versions of these articles have been included in the license as Articles 12, 21, 22, 23, and 24 pursuant to the revision of this Form recently issued.

The Corps also recommended the inclusion of certain special articles in the license, if issued. The Corps stated that Applicant should reimburse the Government for the actual costs of any modifications of the navigation project required to accommodate Applicant's project. Article 49 provides for this reimbursement and specifies that the reimbursement is in addition to annual charges.

In order to minimize the effect of power operations on navigation, the Corps recommended that, upon notification by the Chief of Engineers, the Licensee be required to construct a deflecting wall, within one year, to deflect powerhouse discharges away from the locks. The design, location, time of construction, and maintenance of this pier or wall would be subject to Corps approval. By letter dated July 31, 1970, HCREMC stated that the need for a deflecting pier or wall could be determined after the result of modeling studies of the interrelationship of the hydroelectric plant axis and the

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dam axis were known. Because we can conceive of situations where the installation of a deflecting wall or pier may be in the public interest, even assuming the optimum alignment of hydroelectric plant axis and dam axis, we have provided, in Article 48 of the license, for the installation of this structure, should it become necessary, for the protection of navigation.

The Corps further recommended that Applicant be required to convey to the United States, free of cost, lands, rights-of-way, and rights of passage, and to modify project structures in the event the United States desires to construct, complete or improve navigation facilities at Cannelton. In its July 31, 1970, letter, HCREMC requested that a provision be added to this proposed article to protect the rights of mortgagees, bond holders, or trustees for bond holders for the project, and that the words "for reasonable compensation" be substituted for the words "free of cost". In Article 22 of the license, we have incorporated that portion of the Corps' recommendation which is consistent with the provisions of the Act, particularly Section 11(b).²

The Corps also recommended an article releasing the Government from liability with respect to the construction, operation, and maintenance of both the project and the Cannelton Locks and Dam and providing for the payment by licensee of legal expenses related to suits against the United States. HCREMC, in its aforementioned letter, objected to the release of the Government from liability to Licensee's employees or agents arising out of the construction, operation, and maintenance by the United States of the Cannelton Locks and Dam. While we cannot agree with HCREMC and Vanceburg that the exemption from liability for the United States should be so circumscribed,

²16 U.S.C. §804(b).

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we also cannot concur in the scope of the article proposed by the Corps. Accordingly, for the reasons set forth in our order issuing a license for the Racine Project No. 2570, we have provided for the release of the United States from liability, arising out of the construction, operation, and maintenance by the United States of the Cannelton Locks and Dam, only during the time Vanceburg's agents are engaged in the construction, operation, and maintenance of the power project. *Ohio Power Company*, Project No. 2570, 50 F.P.C. 2020 (1973).

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The Corps recommended that an operating agreement be entered into between the licensee and the District Engineer, that the licensee be required to waive claims against the United States based on present or future changes in navigation pools in the area, that construction schedules be subject to Corps approval, and that power plant operating schedules be provided to designated Corps personnel. Neither HCREMC nor Vanceburg objected to these conditions. We find that incorporation of these articles in the license is appropriate to protect the public interest in navigation. These conditions are set forth as Articles 45, 47, 50, and 51 of the license.

By letter filed February 18, 1974, Vanceburg concurred in HCREMC's comments on the Corps report. Vanceburg did state that the project would not be operated for peaking power purposes or for the purpose of utilizing pondage.

By letter filed July 30, 1970, the United States Department of the Interior (Interior) expressed concern about the effect of the project on water quality. Interior recommended that the project be operated on a continuous basis when river flows are less than 32,500 cfs and that provision be made for reaeration whenever dissolved oxygen content is less than 5 mg/l. Vanceburg has indicated that peaking

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power operations through the use of additional reservoir storage will not be conducted and that Cannelton will operate using only available river flows. Articles 55 and 56 of the license provide for reaeration and monitoring of dissolved oxygen concentrations.

Interior noted that the Kentucky Statewide Comprehensive Outdoor Recreation Plan (SCORP) discussed the present and future need for many outdoor recreation activities in the vicinity of the project. Interior further recommended the filing of a revised Exhibit R. Recreational aspects of the project are discussed in greater detail hereinafter.

By letter dated May 18, 1970, the United States Department of Agriculture, Forest Service, indicated that the project would not affect National Forest programs and that license issuance would benefit the Rural Electrification Program.

The Kentucky Water Pollution Control Commission on September 6, 1972, certified that it has reasonable assurances that applicable water quality standards will not be violated by the project. On October 26, 1972, the Kentucky Water Pollution Control Commission deleted the one-year limitation on certification set forth in their September 6, 1972, letter.

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We have examined the environmental aspects of the project. During construction of the powerhouse the only clearing required would consist of removal of debris along the river bank. Material excavated for the powerhouse would be used to restore an area in the vicinity of the river bank which was eroded during construction of the Cannelton Dam and Locks and to build the earth dam between the Cannelton Dam and the powerhouse. The staging area used for construction of the Cannelton Locks and Dam can also be used for project construction activities.

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The access road to the construction site may, however, have to be relocated. Furthermore, excavation for the powerhouse and related channels will result in some siltation in addition to that resulting from erosion caused by altered flow patterns of the Cannelton Locks and Dam. Articles 19 and 21 of the license require Vanceburg to take measures to prevent soil erosion and to excavate in such a manner as to preserve project environmental values and so as not to interfere with land or water traffic.

We have considered fish and wildlife values in the vicinity of the project. Commercial fishing on the Ohio River has been of economic importance in the past. While commercial fishing has declined in recent years, due partly to pollution and decreased profitability, commercial fishing has an important economic potential. Freshwater mussels add value to the commercial fisheries of the Ohio River. No anadromous fish utilize the Ohio River.

With respect to wildlife, white-tailed deer is the only big game animal in the vicinity of the Cannelton Project. Cottontail rabbit, gray squirrel, and fox squirrel are the most prevalent small game mammals in the project area. Waterfowl occur in the area, but this reach of the Ohio is outside principal waterfowl routes and flyways. No rare or endangered species of fish or wildlife would be affected by the project.

We have considered the fish and wildlife aspects of license issuance under the assumption that commercial and sport fishing will increase with improving water quality and advances in fisheries management techniques. The absence of anadromous fish from the Ohio River limits the need for fish passage facilities. Two variables which affect survival rates of fish passing through turbines are the amount of head and the setting of the turbine blade. The low head at the project and the fact that the turbine runner

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blades can be adjusted are factors which are beneficial to fish survival rates. We are requiring the filing of a revised Exhibit S, based on the results of post-operational studies carried out in cooperation with interested

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Federal and State agencies, to determine the effect of project operation on the fisheries resources and to measure the effectiveness of the reaeration facilities in maintaining desired dissolved oxygen concentrations. Should additional fish protective measures be warranted, we have reserved sufficient authority under the license to require these measures.

Clearance of the transmission line right-of-way will generate the greatest potential impacts on wildlife. While Vanceburg has not selected a route for the 2.8 miles of transmission line, Vanceburg has indicated that Christmas trees would be planted in portions of the right-of-way and that shrubs with wildlife value will be planted on steep slopes and in areas of thin soil in order to prevent erosion. Selective clearing or clear-cutting, in lieu of shear clearing, should be used, where feasible, to minimize disturbance to the top soil and the need for revegetation. Any exposed soil surfaces should be stabilized and revegetated as soon as possible. Where the right-of-way is cleared through forested area, it is recommended that vegetation be managed by applying herbicides to the base of individual trees. This method prevents trees from interfering with power lines while maximizing the opportunity for shrubs and vines to occupy the right-of-way. If these practices are followed, construction, operation, and maintenance of the transmission line right-of-way will not measurably affect timber resources, the area's watershed, or the carrying capacity of the area for wildlife. Consistent with our concern for the potential environmental impacts of the project

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works and the related transmission lines, we are requiring Vanceburg to file with the Commission its plan to avoid or minimize any disturbance to the natural, scenic, historic, and recreation values of the area.

The original Exhibit R filed by HCRECC did not comply with Commission regulations. No revised Exhibit R has been filed by Vanceburg. In its environmental report on the proposed action, however, Vanceburg discussed its proposed plans for a recreation area adjacent to the dam, consisting of parking for about 75 cars, picnic and sanitary facilities, and playing fields to be developed on a spoil area. An observation platform, connected by stairs to a fishing platform at normal river level, is planned by Vanceburg. A pedestrian walkway and roadway bridge would provide access between the platforms and the parking area.

We have heretofore discussed the need for recreational facilities and agency recommendations related thereto. Consistent with these recommendations, we have incorporated Article 54 in the

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license which requires Vanceburg to file a revised Exhibit R providing for facilities for optimal recreational development. Such facilities shall include, but shall not be limited to, those facilities proposed by Vanceburg in the environmental report (Exhibit W).

While fishing in the vicinity of the project is common, and pleasure boating and water skiing also occur, no developed recreational facilities exist on the Kentucky side of the Corps Dam. The project will not interfere with any existing recreational facilities. Furthermore, development of recreational facilities pursuant to an approved Exhibit R can only improve recreational opportunities in an area where such opportunities are currently limited, but the need for such opportunities is great.

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The National Register of Historic Places, established under the provisions of the National Historic Preservation Act of 1966,³ has been consulted. No listed properties, eligible properties, or State inventory properties are located in the vicinity of the project. Should any historic properties be located, however, we have provided for this contingency in Article 41 of the license.

While no historic properties are located in the vicinity of the project, we note that no archeological survey has been conducted. Article 40 requires Licensee, prior to commencement of construction, to determine the necessity for archeological survey and salvage excavations and to provide funds in a reasonable amount for such survey and salvage excavations.

We have considered alternatives to the project. The alternative of denial of the application was considered. Even assuming that Vanceburg is unsuccessful in attracting industry to utilize the power and, thus, cannot utilize all the power itself, the electric power demands of the combined EKRECC-Vanceburg system will require development of an equivalent amount of power. Furthermore, while electric energy conservation practices may initially reduce the need for this capacity by lessening the growth in energy demand, we believe the public interest would best be served by issuing a license and allowing the development of water resources which otherwise would not be utilized, especially where, as here, the dam is in existence

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and environmental impacts are not significant. Indeed, because the project is located at an existing Government dam, designed to accommodate hydroelectric generating equipment, no other conventional hydroelectric site is considered a reasonable alternative. Because the project will

³16 U.S.C. §470.

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be operated as a run-of-the-river facility at a plant factor of approximately 55 percent, pumped storage hydroelectric projects and gas turbine facilities, which serve peaking functions, are not considered reasonable alternatives.

Of those alternatives which have a comparable plant factor, fossil fueled steam electric generating units are considered the most viable alternatives. Our studies indicate that a fossil fueled unit sized to meet the needs of a combined EKRECC-Vanceburg system would not provide power as economically as the power to be produced at Cannelton. Furthermore, such a fossil fueled unit would utilize a non-renewable resource with attendant air quality problems.

The issuance of this license for the construction and operation of Project No. 2245 will provide for the use of a renewable resource to produce an average of 340,000,000 kilowatt-hours of electric energy annually. This will conserve fuel resources equivalent to 540,000 barrels of oil annually.

There are no conflicting applications for preliminary permit or license before the Commission. While Southern Indiana Gas & Electric Company (SIGE) filed an application for a preliminary permit for the Cannelton site on March 26, 1959, a preliminary permit issued to HCRECC on October 28, 1958, was then in effect. Accordingly, the Secretary rejected the SIGE filing by letter dated April 1, 1959. See 18 C.F.R. §4.30 (1975).

We have examined the economic and financial feasibility of the project. With respect to financial feasibility, Applicant has demonstrated that it can obtain the necessary financing to construct the project through the issuance of revenue bonds.

Based on our studies, a fossil fueled steam-electric generating facility, which is the least expensive alternative

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energy source, could provide capacity and energy equivalent to that estimated to be generated at the project, at an annual cost of \$4,457,700. The annual cost of producing power from the project is estimated to be \$3,970,300. In light of the facts that the estimated cost of producing power from the project is less than the estimated cost of producing an equivalent amount of power from a suitable alternative and that an adequate market for the power has been demonstrated, we conclude that the project is feasible from an economic standpoint.

Section 10(e) of the Act, 16 U.S.C. §803(e), requires the Commission to fix a reasonable annual charge to be paid to the United States for the use of a Government dam. The matter of such an annual charge is discussed at greater length in the Order Issuing License (Major) and Dismissing Application for Preliminary Permit for the Greenup Project No. 2614, where we follow long-standing, consistent Commission practice by adopting the "sharing of the net benefits" approach to the assessment of the charge. Based upon this approach and an analysis by our staff of the net benefits

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to be derived from the Cannelton Project, we find that the annual charge to be paid by Vanceburg for its use of the Government dam should be \$243,700. For the reasons set forth in the above mentioned order issuing a license for the Greenup Project, we will assess one-third of the total annual charge with the effective date of commercial operation of each of the three generating units at the Cannelton Project. These annual charges are provided for in Article 57 of this license.

We have heretofore discussed the environmental effects of construction, operation, and maintenance of the two 2.8-mile-long single-circuit 161 kV transmission lines, and

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have conditioned the license accordingly. The Big Rivers' Coleman-Hardinsburg line will be looped via these 2.8-mile lines through the 161 kV bus at Cannelton. Based on available information, we cannot determine whether the Coleman-Cannelton, Cannelton-Hardinsburg 161 kV line and the Cannelton 161 kV bus should be included in the license without the benefit of actual data on power flows over these lines. Therefore, we have reserved the right to determine what additional transmission facilities, if any, should be included within the license for the Cannelton Project No. 2245.

We now turn to the allegations advanced by KIMPA. In the Order Issuing License (Major) and Dismissing Application for Preliminary Permit for the Greenup Project No. 2614, we discuss these allegations in detail. However, one of KIMPA's alternatives to the use of power from the Cannelton and Greenup projects is particularly germane to our consideration of this application. Therefore, we discuss that marketing plan here.

In the early part of 1974, KIMPA suggested that Vanceburg and EKRECC modify their Memorandum of Understanding to allow KIMPA to be substituted as the applicant for license for the Cannelton Project No. 2245. On May 17, 1974, Vanceburg stated that no action would be taken on this proposal until EKRECC agreed to the proposal. EKRECC has taken no action on the proposal.

If KIMPA was genuinely interested in obtaining a license for this project, it could have filed an application for license. No authorization from Vanceburg or EKRECC was necessary for this action. Indeed, because Vanceburg never held a preliminary permit for this project, Vanceburg has no priority under Section 5⁴ of the Act. Furthermore, because both Vanceburg and KIMPA are municipal-

⁴16 U.S.C. §798.

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ities within the meaning of the Act, neither would be entitled to a preference under Section 7(a)⁵ of the Act. Thus, competing applications by KIMPA and Vanceburg would be evaluated under the comprehensive development standard of Section 10(a)⁶ of the Act. In that

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situation a determination whether KIMPA's application or Vanceburg's application would best satisfy the statutory standard would certainly be in the public interest.

KIMPA had a remedy under the Act for Vanceburg's and EKRECC's failure to accede to KIMPA's request: the filing of a competing application for license. The fact that KIMPA has not availed itself of this remedy, a remedy which is clearly within our authority, provides additional justification for our disposition of the marketing aspects of this proceeding.

We have heretofore discussed the expected environmental impacts of construction, operation, and maintenance of the project. Based on these impacts, we conclude that issuance of a license subject to the terms and conditions hereinafter imposed would not be a major Federal action significantly affecting the quality of the human environment within the meaning of Section 102(2)(C)⁷ of the National Environmental Policy Act of 1969.

The Commission finds:

(1) The Cannelton Project No. 2245 would affect lands of the United States, would be located on a navigable waterway of the United States, and would utilize the surplus water or water power from a Government dam.

(2) Applicant is a corporation organized under the laws of the State of Kentucky and has submitted satisfactory

⁵16 U.S.C. §800(a).

⁶16 U.S.C. §803(a).

⁷42 U.S.C. §4332(2)(C).

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evidence of compliance with the requirements of all applicable State laws insofar as necessary to effectuate the purposes of a license for the project.

(3) Public notice of the filing of the application was given on September 7, 1962, and September 8, 1971. A late petition to intervene, filed by the Kentucky-Indiana Municipal Power Association on June 7, 1974, was granted by Commission order issued December 4, 1974.

(4) For the reasons set forth in this order and in our Order Issuing License (Major) and Dismissing Application for Preliminary Permit for the Greenup Project No. 2614, the allegations raised by Kentucky-Indiana

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Municipal Power Association present no disputed facts or facts which have not been accepted as true for the purposes of decision. Therefore, an evidentiary hearing is neither warranted nor in the public interest.

(5) No conflicting application is before the Commission.

(6) Subject to the terms and conditions hereinafter imposed, the project does not adversely affect a Government dam, nor will the issuance of a license therefor, as hereinafter provided, affect the development of any water resources for public purposes which should be undertaken by the United States.

(7) Subject to the terms and conditions hereinafter imposed, the project will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes.

(8) Applicant has submitted satisfactory evidence of its financial ability to construct, operate, and maintain the proposed project.

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(9) The estimated cost of developing the project compared to the estimated cost of developing suitable alternative sources of power is reasonable.

(10) The installed horsepower capacity of the project hereinafter authorized for the purpose of computing the capacity component of the administrative annual charge is 94,100 horsepower, and the amount of annual charges based on such capacity to be paid under the license for the project for the cost of administration of Part I of the Act is reasonable.

(11) For the purpose of recompensing the United States for the use of the Government's Cannelton Locks and Dam and appurtenant structures, the annual charge for such use is hereinafter authorized to be \$243,700 which charge is reasonable, is based upon the "sharing of the net benefits" method; and may be readjusted in the future pursuant to Section 10(e) of the Act.

(12) It is desirable to reserve for a later date a determination as to the amount of annual charges for the use, occupancy and enjoyment of lands of the United States.

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(13) Subject to the terms and conditions hereinafter imposed, the plans of the structures affecting navigation have been approved by the Corps of Engineers.

(14) The term of the license hereinafter authorized is 50 years, which term is reasonable.

(15) The exhibits designated and described in Paragraph (B) below conform to the Commission's Rules and Regulations and should be approved as part of the license for the project to the extent indicated herein.

The Commission orders:

(A) This license is hereby issued to the City of Vanceburg, Kentucky (hereinafter Licensee), under Section 4(e)

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of the Federal Power Act for a period of 50 years effective the first day of the month in which this license is issued for the construction, operation and maintenance of the Cannelton Hydroelectric Project No. 2245, located on the Ohio River and affecting navigable waters of the United States, and utilizing surplus water or water power from, and affecting, the Cannelton Locks and Dam of the United States and appurtenant lands acquired by the Corps of Engineers, subject to the terms and conditions of the Act, which is incorporated herein by reference as a part of this license, and subject to such rules and regulations as the Commission has issued or prescribed under the provisions of the Act.

(B) The Cannelton Project consists of:

(i) all lands constituting the project area and enclosed by the project boundary or the limits of which are otherwise defined, and/or interests in such lands necessary or appropriate for the purposes of the project, whether such lands or interests therein are owned or held by the applicant or by the United States; such project area and project boundary being more generally shown and described by certain exhibits which formed part of the application for license and which are designated and described as follows:

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<u>Exhibit</u>	<u>FPC Number</u>	<u>Title</u>
J-1	2245-25	General Map and Profile of River
J-2	2245-26	General Plan and Vicinity Map
J-3	2245-27	Project Plan
J-4	2245-28	Transmission System
K	2245-29	Land Ownership Map

approved only to the extent that they show the general location of the project

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(ii) project works to be constructed on the Kentucky side of the Ohio River in an excavated channel including: (1) a forebay channel and a tailrace channel; (2) a concrete powerhouse containing 3 submerged bulb-type hydroelectric generating units with a total installed capacity of 70,560 kW; (3) a bridge connecting the powerhouse to an access road south of the project; (4) an earthen dam with a top elevation of 388 feet between the U. S. Cannelton Dam and the powerhouse; (5) the generator leads; (6) the 4.8/161 kV step-up transformer; and (7) appurtenant facilities which connect to the 161 kV bus (excluding the 161 kV bus) and other appurtenant facilities—the location, nature and character of which are most specifically shown and described by the exhibits hereinbefore cited and by certain other exhibits which also form part of the application for license and which are designated and described as follows:

<u>Exhibit</u>	<u>FPC Number</u>	<u>Showing</u>
L-1	2245-30	Powerhouse Plan
L-2	2245-31	Section through Powerhouse
L-3	2245-32	Transverse Section

Exhibit M: Consisting of two typewritten pages, filed December 12, 1969, entitled "Mechanical and Electric Equipment."

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(iii) all of the structures, fixtures, equipment, or facilities used or useful in the maintenance and operation of the project and located within the project area, and such other property as may be used or useful in connection with the project or any part thereof, whether located on or off the project area, if and to the extent that the inclusion of such property as part of the project is approved or acquiesced in by the Com-

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mission; together with all riparian or other rights, the use or possession of which is necessary or appropriate in the maintenance or operation of the project.

(C) This license is also subject to the terms and conditions set forth in Form L-6 (revised October, 1975) entitled "Terms and Conditions of License for Unconstructed Major Project Affecting Navigable Waters and Lands of the United States," which terms and conditions, designated as Articles 1 through 37, are attached hereto and made a part hereof, except for Articles 7 and 20, which are hereby deleted for the purposes of this license, and subject to the following special conditions set forth herein as additional articles:

Article 38. The Licensee shall dispose of all temporary structures, unused timber, brush, refuse, or other unneeded material resulting from the clearing of lands or from the maintenance of the project works and associated transmission facilities. Disposal of the material shall be done with due diligence and to the satisfaction of the authorized representative of the Commission and in accordance with appropriate Federal, State, and local statutes and regulations.

Article 39. The Licensee shall, during the construction and operation of the project, continue to consult and cooperate with the Fish and Wildlife Service of the U. S. Department of the Interior and other appropriate Federal, State, and local agencies for the protection and development of the natural resources and values of the project area.

Article 40. The Licensee shall, prior to commencement of construction, consult and cooperate with appropriate Federal, State, and local agencies to determine the extent of archeological survey

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and salvage excavations, if any, that may be necessary prior to any construction activities, and shall provide funds in a reasonable amount for any needed survey or salvage excavations to be conducted.

Article 41. The Licensee shall cooperate with appropriate State and local agencies in the identification of historical structures, if any, within the project area, and if necessary, shall cooperate in developing a plan for the protection or relocation of such structures.

Article 42. The Licensee shall, to the satisfaction of the Commission's authorized representative, install and operate such signs, lights, sirens, or other devices below the powerhouse to warn the public of fluctuations in flow from the project, and shall install such signs, lights and other safety devices above the powerhouse intakes, as may be reasonably needed to protect the public in its recreational use of project lands and waters.

Article 43. The Licensee shall release and save and hold the Government harmless from any and all causes of action, suits-at-law or equity, or claims or demands, or from any liability of any nature whatsoever, for and on account of any property damage (including damages thereto or taking of real estate or interests therein by reason of the flooding and/or erosion of such property by impoundments and/or discharges for purposes other than operation and maintenance of the Cannelton Locks and Dam project for navigation purposes), personal injury, or death arising out of the construction, operation, and maintenance of the power project; and the Licensee shall release and save and hold the Government harmless from any and all causes of ac-

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tion, suits-at-law or in equity, or claims or demands, or from any liability of any nature whatsoever for and on account of any property damage, personal injury, or death of any of the Licensee's employees, contractors, licensees, agents, permittees, or assignees during the time they are engaged in the construction, operation, and maintenance of the power project, and arising out of the construction, operation, and maintenance by the

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United States of the Cannelton Locks and Dam project. In partial support of its obligations under this clause, the Licensee shall defend or, at the option of the Government, shall reimburse the Government for all costs of defending, all claims and suits-at-law or in equity instituted against the United States for any damage caused or alleged to have been caused by operation of the power project, or the operation of the Cannelton Locks and Dam project in aid of the power project, including payment to landowners for any inverse or physical taking of real estate or interest therein adjudged by any court of competent jurisdiction by verdict, decision, or agreement of parties, to have resulted from the operation of the power project or the operation of the Cannelton Locks and Dam project in aid of such power project (including litigation in which the United States is not a defendant); and, on request of the United States, shall properly record in the land records of the appropriate county and State all such judgments of said courts, and shall procure and record any other evidence of such taking, and payment therefor, reasonably required by the United States, running to the Licensee or to the United States, as determined appropriate by the United States, including takings adjudged as aforesaid by

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courts of competent jurisdiction and agreements made between the Licensee and landowners in compromise or avoidance of litigation.

Article 44. The Licensee shall commence construction of the project within two years from the effective date of the license, shall thereafter in good faith and with due diligence prosecute such construction, and shall complete construction of such project works within five years from the effective date of the license.

Article 45. The design and construction of all facilities that will be an integral part of the dam or that could affect the integrity of the navigation system, including construction procedure and sequence, shall be subject to the review and approval of the District Engineer, Corps of Engineers, Louisville, Kentucky.

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Article 46. The Licensee shall, after obtaining written approval from the Chief of Engineers of the plans of any project structures affecting navigation, submit, in accordance with the Commission's Rules and Regulations, revised Exhibit L drawings and an Exhibit M showing final designs of the project works, and a revised Exhibit J-3 showing, *inter alia*, the location and orientation of the project works with respect to the Government dam. The Licensee shall not begin construction of any such project structures until the Commission has approved such exhibits.

Article 47. The Licensee shall, prior to initiation of power operations, enter into an agreement with the District Engineer, Corps of Engineers, Louisville, Kentucky, specifying details of an operating plan to protect Federal interests, including limitations of fluctuations in the Cannelton Reservoir and the reservoir im-

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mediately downstream. This agreement shall be subject to review upon the request of either party on the basis of operating experience.

Article 48. In the event the Chief of Engineers shall deem it necessary for the protection of navigation, and shall so notify the Commission, the Commission, after notice and opportunity for hearing, may require the Licensee at no expense to the Federal Government, and within one year from said date of notification, to construct a deflecting pier or wall in the river below the dam to deflect the current caused by discharge from the power plant away from the entrance to the locks. The Licensee shall maintain such facilities at his expense. The design, location, and time of construction of such deflecting pier or wall shall be subject to the approval of the Chief of Engineers.

Article 49. The Licensee shall reimburse the Government for all costs, including design and construction costs incurred by the Government for the specific and sole purpose of accommodating the Licensee's project. These costs will be in addition to the annual payments specified in paragraph (ii) of Article 57. Arrangements for payment shall be made with the Chief of Engineers, U. S. Department of the Army, at the time of commencement of construction of the project.

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Article 50. The Licensee shall furnish designated Corps of Engineers operating personnel with proposed operating schedules of the power plant, including information on operation of air vents, if pertinent, in advance of power plant operation and revisions thereof on reasonable notice.

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Article 51. The Licensee shall have no claim against the United States arising from the effect of any changes made or not made in the pool levels at Cannelton Locks and Dam or the downstream locks and dam for navigation or other beneficial purposes.

Article 52. The Licensee shall avoid or minimize any disturbance caused by construction, operation, and maintenance of the project works and related transmission lines to the natural, scenic, historic and recreational values of the area, blending project works and related transmission lines with the natural view, and revegetating, stabilizing, and landscaping all construction areas. Within one year from the date of issuance of this license, the Licensee shall file with the Commission its detailed plan to avoid or minimize any disturbance to such values caused by construction, operation, and maintenance of the project works and related transmission lines. The plan, including an architectural rendering of the major project features, shall be prepared after consultation with a professional land use planner and appropriate Federal, State, and local agencies, and shall give due consideration to the provisions of the Commission's Order No. 414, issued November 27, 1970. The Commission reserves the right, after notice and opportunity for hearing, to prescribe any changes in the plans that the public interest may warrant.

Article 53. Within one year after commencement of construction of the project and after consultation with the Corps of Engineers concerning the location of the proposed project boundary, the Licensee shall file a revised Exhibit F and for Commission approval, revised Exhibits J and K delineating the proposed project boundary and the amount of United States

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lands within said boundary. The Licensee shall acquire title in fee to all lands, other than lands of the United States and lands for transmission line rights-of-way, within the project boundary shown on the Exhibits J and K approved by the Commission pursuant to this article.

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Article 54. The Licensee shall file, for Commission approval, within one year from the date of issuance of this license, a revised Exhibit R in conformance with Section 4.41 of the Regulations under the Federal Power Act. The Exhibit shall be prepared in consultation and cooperation with appropriate Federal, State, and local agencies, and after a study with those agencies to determine the recreational facilities needed to provide for optimum public utilization of the project area. The revised Exhibit shall include, but shall not be limited to, site development plans, cost estimates, and development schedules for the sanitary, picnic and parking facilities; the public fishing facilities in the tailrace area; and the overlook area on the Kentucky side of the dam, as proposed on pages 81 and 82 and shown on Figures II-3, II-4, and II-5 of Appendix II of the Exhibit W, filed as part of the application for license for Project No. 2245.

Article 55. The Licensee, following consultation with appropriate water quality agencies, shall install a continuously recording dissolved oxygen monitoring system positioned to sample water discharged from the project during generation, and shall maintain records of the data obtained from the monitoring system and make them available to appropriate agencies upon request. The Licensee shall install facilities for the admission of air into the draft tubes and shall during power

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generation periods, operate such facilities whenever the dissolved oxygen concentration in the project discharge declines below 5.0 mg/l.

Article 56. The Licensee shall conduct studies, in cooperation with appropriate Federal, State, and local agencies, to determine any effects the project will have on fishery resources and, within three years from the date of commencement of operation of the project, shall file for Commission approval a revised Exhibit S prepared in accordance with Section 4.41 of the Commission's Regulations which shall include, *inter alia*, the conclusions of said studies and a summary of the operation of the air admission and dissolved oxygen monitoring systems in maintaining desired dissolved oxygen levels in the project discharge as required in Article 55 of this license.

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Article 57. The Licensee shall pay to the United States the following annual charges:

(i) For the purpose of reimbursing the United States for the cost of administration of Part I of the Act, a reasonable annual charge as determined by the Commission, in accordance with its regulations in effect from time to time, the authorized installed capacity for such purpose being 94,100 horsepower;

(ii) For the purpose of recompensing the United States for the utilization of the Government's Cannelton Locks and Dam and appurtenant structures, \$243,700 which charge may be readjusted in the future pursuant to the provisions of Section 10(e) of the Act, and which shall be assessed as follows: (a) \$81,234 effective as of the date of commercial operation of the first generating unit; (b) \$162,467

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effective as of the date of commercial operation of the second generating unit; and (c) \$243,700 effective as of the date of commercial operation of the third generating unit;

(iii) For the purpose of recompensing the United States for the use, occupancy, and enjoyment of its lands, an amount to be hereafter determined by the Commission.

(D) The Commission reserves the right to determine at a future date what additional transmission facilities, if any, shall be included within the license for this project.

(E) The Exhibits designated and described in Paragraph (B) above are hereby approved to the extent indicated therein and made a part of the license.

(F) This order shall become final 30 days from the date of its issuance unless application for rehearing shall be filed as provided in Section 313(a) of the Act, and failure to file such an application shall constitute acceptance of this license. In acknowledgment of the acceptance of this license, it shall be signed for the Licensee and returned to the Commission within 60 days from the date of issuance of this order.

By the Commission.

(S E A L)

Kenneth F. Plumb,
Secretary.

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APPENDIX A

Computation of Net Power Benefits,
Cannelton Project No. 2245

1. Cannelton Hydroelectric Project No. 2245

Installed Capacity	70.56 MW	
Est. Average Annual Generation	340 GWh	
Est. Dependable Capacity	32.5 MW	
Estimated Capital Cost, 1/75	\$33,914,000	
Est. Power Supplied to U.S. Government		
Energy	— 0.648 GWh	
Capacity	— 0.394 MW	
Estimated Annual Cost		
Fixed (33,914) (.1126)		\$3,818,700
O & M & A & G		146,000
FPC Annual Charge		5,600
Total		\$3,970,300

2. Steam Electric Plant Alternative

(2,500 MW Units w. Cooling Towers)		
Estimated Capital Cost (1/75)	\$/kW	
Steam Plant	363.74	
Transmission	49.70	
Total	413.44	
Estimated Annual Cost		
Fixed (\$413.44) x 0.1181	48.83	
O & M A & G	2.63	
Fuel, fixed & inventory	4.72	
Total	56.18	
Estimated Variable Cost	7.91 mills/kWh	

3. Estimated Annual Value

Capacity ¹ (31,960-394) kW x \$56.18/kW	= \$1,773,400
Energy (340,000-648) MWh x \$7.91/MWh	= \$2,684,300
Total	\$4,457,700

4. Estimated Net Power Benefit

$$\$4,457,700 - \$3,970,300 = \$487,400$$

$$\frac{\text{Hydro adjustment}}{\text{dependable capacity}} \times \frac{\text{probability of meeting load-hydro}}{\text{probability of meeting load-steam}} = 31,960$$

$$32,500 \times \frac{0.87771}{0.89257} = 31,960$$

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Form L-6

(Revised October, 1975)

FEDERAL POWER COMMISSION

TERMS AND CONDITIONS OF LICENCE FOR UNCON-
STRUCTED MAJOR PROJECT AFFECTING NAVI-
GABLE WATERS AND LANDS OF THE UNITED
STATES

Article 1. The entire project, as described in this order of the Commission, shall be subject to all of the provisions, terms, and conditions of the license.

Article 2. No substantial change shall be made in the maps, plans, specifications, and statements described and designated as exhibits and approved by the Commission in its order as a part of the license until such change shall have been approved by the Commission: *Provided, however,* That if the Licensee or the Commission deems it necessary or desirable that said approved exhibits, or any of them, be changed, there shall be submitted to the Commission for approval a revised, or additional exhibit or exhibits covering the proposed changes which, upon approval by the Commission, shall become a part of the license and shall supersede, in whole or in part, such exhibit or exhibits theretofore made a part of the license as may be specified by the Commission.

Article 3. The project works shall be constructed in substantial conformity with the approved exhibits referred to in Article 2 herein or as changed in accordance with the provisions of said article. Except when emergency shall require for the protection of navigation, life, health, or property, there shall not be made without prior approval of the Com-

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mission any substantial alteration or addition not in conformity with the approved plans to any dam or other project works under the license or any substantial use of project lands and waters not authorized herein; and any emergency alteration, addition, or use so made shall thereafter be subject to such modification and change as the Commission may direct. Minor changes in project works, or in uses of project lands and waters, or divergence from such approved exhibits may be made if such changes will not result in a decrease in efficiency, in a material increase in cost, in an adverse environmental impact, or in impairment of the general scheme of development; but any of such minor changes made without the prior approval of the Commission, which in its judgment have produced or will produce any of such results, shall be subject to such alteration as the Commission may direct.

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Upon the completion of the project, or at such other time as the Commission may direct, the Licensee shall submit to the Commission for approval revised exhibits insofar as necessary to show any divergence from or variations in the project area and project boundary as finally located or in the project works as actually constructed when compared with the area and boundary shown and the works described in the license or in the exhibits approved by the Commission, together with a statement in writing setting forth the reasons which in the opinion of the Licensee necessitated or justified variation in or divergence from the approved exhibits. Such revised exhibits shall, if and when approved by the Commission, be made a part of the license under the provisions of Article 2 hereof.

Article 4. The construction, operation, and maintenance of the project and any work incidental to additions or alterations shall be subject to the inspection and supervision

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of the Regional Engineer, Federal Power Commission, in the region wherein the project is located, or of such other officer or agent as the Commission may designate, who shall be the authorized representative of the Commission for such purposes. The Licensee shall cooperate fully with said representative and shall furnish him a detailed program of inspection by the Licensee that will provide for an adequate and qualified inspection force for construction of the project and for any subsequent alterations to the project. Construction of the project works or any feature or alteration thereof shall not be initiated until the program of inspection for the project works or any such feature thereof has been approved by said representative. The Licensee shall also furnish to said representative such further information as he may require concerning the construction, operation, and maintenance of the project, and of any alteration thereof, and shall notify him of the date upon which work will begin, as far in advance thereof as said representative may reasonably specify, and shall notify him promptly in writing of any suspension of work for a period of more than one week, and of its resumption and completion. The Licensee shall allow said representative and other officers or employees of the United States, showing proper credentials, free and unrestricted access to, through, and across the project lands and project works in the performance of their official duties. The Licensee shall comply with such rules and regulations of general or special applicability as the Commission may prescribe from time to time for the protection of life, health, or property.

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Article 5. The Licensee, within five years from the date of issuance of the license, shall acquire title in fee or the right to use in perpetuity all lands, other than lands of the United States, necessary or appropriate for the construc-

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tion, maintenance, and operation of the project. The Licensee or its successors and assigns shall, during the period of the license, retain the possession of all project property covered by the license as issued or as later amended, including the project area, the project works, and all franchises, easements, water rights, and rights of occupancy and use; and none of such properties shall be voluntarily sold, leased, transferred, abandoned, or otherwise disposed of without the prior written approval of the Commission, except that the Licensee may lease or otherwise dispose of interests in project lands or property without specific written approval of the Commission pursuant to the then current regulations of the Commission. The provisions of this article are not intended to prevent the abandonment or the retirement from service of structures, equipment, or other project works in connection with replacements thereof when they become obsolete, inadequate, or inefficient for further service due to wear and tear; and mortgage or trust deeds or judicial sales made thereunder, or tax sales, shall not be deemed voluntary transfers within the meaning of this article.

Article 6. In the event the project is taken over by the United States upon the termination of the license as provided in Section 14 of the Federal Power Act, or is transferred to a new licensee or to a non-power licensee under the provisions of Section 15 of said Act, the Licensee, its successors and assigns shall be responsible for, and shall make good any defect of title to, or of right of occupancy and use in, any of such project property that is necessary or appropriate or valuable and serviceable in the maintenance and operation of the project, and shall pay and discharge, or shall assume responsibility for payment and discharge of, all liens or encumbrances upon the project or

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project property created by the Licensee or created or incurred after the issuance of the license: *Provided*, That the provisions of this article are not intended to require the Licensee, for the purpose of transferring the project to the United States or to a new licensee, to acquire any different title to, or right of occupancy and use in, any of such project property than was necessary to acquire for its own purposes as the Licensee.

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Article 7. The actual legitimate original cost of the project, and of any addition thereto or betterment thereof, shall be determined by the Commission in accordance with the Federal Power Act and the Commission's Rules and Regulations thereunder.

Article 8. The Licensee shall install and thereafter maintain gages and stream-gaging stations for the purpose of determining the stage and flow of the stream or streams on which the project is located, the amount of water held in and withdrawn from storage, and the effective head on the turbines; shall provide for the required reading of such gages and for the adequate rating of such stations; and shall install and maintain standard meters adequate for the determination of the amount of electric energy generated by the project works. The number, character, and location of gages, meters, or other measuring devices, and the method of operation thereof, shall at all times be satisfactory to the Commission or its authorized representative. The Commission reserves the right, after notice and opportunity for hearing, to require such alterations in the number, character, and location of gages, meters, or other measuring devices, and the method of operation thereof, as are necessary to secure adequate determinations. The installation of gages, the rating of said stream or streams, and the determination of the flow thereof, shall be under the

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supervision of, or in cooperation with, the District Engineer of the United States Geological Survey having charge of stream-gaging operations in the region of the project, and the Licensee shall advance to the United States Geological Survey the amount of funds estimated to be necessary for such supervision, or cooperation for such periods as may be mutually agreed upon. The Licensee shall keep accurate and sufficient records of the foregoing determinations to the satisfaction of the Commission, and shall make return of such records annually at such time and in such form as the Commission may prescribe.

Article 9. The Licensee shall, after notice and opportunity for hearing, install additional capacity or make other changes in the project as directed by the Commission, to the extent that it is economically sound and in the public interest to do so.

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Article 10. The Licensee shall, after notice and opportunity for hearing, coordinate the operation of the project, electrically and hydraulically, with such other projects or power system and in such manner as the Commission may direct in the interest of power and other beneficial public uses of water resources, and on such conditions concerning the equitable sharing of benefits by the Licensee as the Commission may order.

Article 11. Whenever the Licensee is directly benefited by the construction work of another licensee, a permittee, or the United States on a storage reservoir or other headwater improvement, the Licensee shall reimburse the owner of the headwater improvement for such part of the annual charges for interest, maintenance, and depreciation thereof as the Commission shall determine to be equitable, and shall pay to the United States the cost of making such deter-

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mination as fixed by the Commission. For benefits provided by a storage reservoir or other headwater improvement of the United States, the Licensee shall pay to the Commission the amounts for which it is billed from time to time for such headwater benefits and for the cost of making the determinations pursuant to the then current regulations of the Commission under the Federal Power Act.

Article 12. The United States specifically retains and safeguards the right to use water in such amount, to be determined by the Secretary of the Army, as may be necessary for the purposes of navigation on the navigable waterway affected; and the operations of the Licensee, so far as they affect the use, storage and discharge from storage of waters affected by the license, shall at all times be controlled by such reasonable rules and regulations as the Secretary of the Army may prescribe in the interest of navigation, and as the Commission may prescribe for the protection of life, health, and property, and in the interest of the fullest practicable conservation and utilization of such waters for power purposes and for other beneficial public uses, including recreational purposes, and the Licensee shall release water from the project reservoir at such rate in cubic feet per second, or such volume in acre-feet per specified period of time, as the Secretary of the Army may prescribe in the interest of navigation, or as the Commission may prescribe for the other purposes hereinbefore mentioned.

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Article 13. On the application of any person, association, corporation, Federal agency, State or municipality, the Licensee shall permit such reasonable use of its reservoir or other project properties, including works, lands and water rights, or parts thereof, as may be ordered by the Commission, after notice and opportunity for hearing, in

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the interests of comprehensive development of the waterway or waterways involved and the conservation and utilization of the water resources of the region for water supply or for the purposes of steam-electric, irrigation, industrial, municipal or similar uses. The Licensee shall receive reasonable compensation for use of its reservoir or other project properties or parts thereof for such purposes, to include at least full reimbursement for any damages or expenses which the joint use causes the Licensee to incur. Any such compensation shall be fixed by the Commission either by approval of an agreement between the Licensee and the party or parties benefiting or after notice and opportunity for hearing. Applications shall contain information in sufficient detail to afford a full understanding of the proposed use, including satisfactory evidence that the applicant possesses necessary water rights pursuant to applicable State law, or a showing of cause why such evidence cannot concurrently be submitted, and a statement as to the relationship of the proposed use to any State or municipal plans or orders which may have been adopted with respect to the use of such waters.

Article 14. In the construction or maintenance of the project works, the Licensee shall place and maintain suitable structures and devices to reduce to a reasonable degree the liability of contact between its transmission lines and telegraph, telephone and other signal wires or power transmission lines constructed prior to its transmission lines and not owned by the Licensee, and shall also place and maintain suitable structures and devices to reduce to a reasonable degree the liability of any structures or wires falling or obstructing traffic or endangering life. None of the provisions of this article are intended to relieve the Licensee from any responsibility or requirement which may be im-

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posed by any other lawful authority for avoiding or eliminating inductive interference.

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Article 15. The Licensee shall, for the conservation and development of fish and wildlife resources, construct, maintain, and operate, or arrange for the construction, maintenance, and operation of such reasonable facilities, and comply with such reasonable modifications of the project structures and operation, as may be ordered by the Commission upon its own motion or upon the recommendation of the Secretary of the Interior or the fish and wildlife agency or agencies of any State in which the project or a part thereof is located, after notice and opportunity for hearing.

Article 16. Whenever the United States shall desire, in connection with the project, to construct fish and wildlife facilities or to improve the existing fish and wildlife facilities at its own expense, the Licensee shall permit the United States or its designated agency to use, free of cost, such of the Licensee's lands and interests in lands, reservoirs, waterways and project works as may be reasonably required to complete such facilities or such improvements thereof. In addition, after notice and opportunity for hearing, the Licensee shall modify the project operation as may be reasonably prescribed by the Commission in order to permit the maintenance and operation of the fish and wildlife facilities constructed or improved by the United States under the provisions of this article. This article shall not be interpreted to place any obligation on the United States to construct or improve fish and wildlife facilities or to relieve the Licensee of any obligation under this license.

Article 17. The Licensee shall construct, maintain, and operate, or shall arrange for the construction, maintenance,

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and operation of such reasonable recreational facilities, including modifications thereto, such as access roads, wharves, launching ramps, beaches, picnic and camping areas, sanitary facilities, and utilities, giving consideration to the needs of the physically handicapped, and shall comply with such reasonable modifications of the project, as may be prescribed hereafter by the Commission during the term of this license upon its own motion or upon the recommendation of the Secretary of the Interior or other interested Federal or State agencies, after notice and opportunity for hearing.

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Article 18. So far as is consistent with proper operation of the project, the Licensee shall allow the public free access, to a reasonable extent, to project waters and adjacent project lands owned by the Licensee for the purpose of full public utilization of such lands and waters for navigation and for outdoor recreational purposes, including fishing and hunting: *Provided*, That the Licensee may reserve from public access such portions of the project waters, adjacent lands, and project facilities as may be necessary for the protection of life, health, and property.

Article 19. In the construction, maintenance, or operation of the project, the Licensee shall be responsible for, and shall take reasonable measures to prevent, soil erosion on lands adjacent to streams or other waters, stream sedimentation, and any form of water or air pollution. The Commission, upon request or upon its own motion, may order the Licensee to take such measures as the Commission finds to be necessary for these purposes, after notice and opportunity for hearing.

Article 20. The Licensee shall consult with the appropriate State and Federal agencies and, within one year of the date of issuance of this license, shall submit for Commission approval a plan for clearing the reservoir

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area. Further, the Licensee shall clear and keep clear to an adequate width lands along open conduits and shall dispose of all temporary structures, unused timber, brush, refuse, or other material unnecessary for the purposes of the project which results from the clearing of lands or from the maintenance or alteration of the project works. In addition, all trees along the periphery of project reservoirs which may die during operations of the project shall be removed. Upon approval of the clearing plan all clearing of the lands and disposal of the unnecessary material shall be done with due diligence and to the satisfaction of the authorized representative of the Commission and in accordance with appropriate Federal, State, and local statutes and regulations.

Article 21. Material may be dredged or excavated from, or placed as fill in, project lands and/or waters only in the prosecution of work specifically authorized under the license; in the maintenance of the project; or after obtaining Commission approval, as appropriate. Any such material shall be removed and/or deposited in such manner as to reasonably preserve the environmental values of the

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project and so as not to interfere with traffic on land or water. Dredging and filling in a navigable water of the United States shall also be done to the satisfaction of the District Engineer, Department of the Army, in charge of the locality.

Article 22. Whenever the United States shall desire to construct, complete, or improve navigation facilities in connection with the project, the Licensee shall convey to the United States, free of cost, such of its lands and rights-of-way and such rights of passage through its dams or other structures, and shall permit such control of its pools, as may

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be required to complete and maintain such navigation facilities.

Article 23. The operation of any navigation facilities which may be constructed as a part of, or in connection with, any dam or diversion structure constituting a part of the project works shall at all times be controlled by such reasonable rules and regulations in the interest of navigation, including control of the level of the pool caused by such dam or diversion structure, as may be made from time to time by the Secretary of the Army.

Article 24. The Licensee shall furnish power free of cost to the United States for the operation and maintenance of navigation facilities in the vicinity of the project at the voltage and frequency required by such facilities and at a point adjacent thereto, whether said facilities are constructed by the Licensee or by the United States.

Article 25. The Licensee shall construct, maintain, and operate at its own expense such lights and other signals for the protection of navigation as may be directed by the Secretary of the Department in which the Coast Guard is operating.

Article 26. Timber on lands of the United States cut, used, or destroyed in the construction and maintenance of the project works, or in the clearing of said lands, shall be paid for, and the resulting slash and debris disposed of, in accordance with the requirements of the agency of the United States having jurisdiction over said lands. Payment for merchantable timber shall be at current stumpage rates, and payment for young growth timber below merchantable size shall be at current damage appraisal values. However, the agency of the United States having jurisdiction may sell or dispose of the merchantable timber to others than the Licensee: *Provided, That* timber

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so sold or disposed of shall be cut and removed from the area prior to, or without undue interference with, clearing operations of the Licensee and in coordination with the Licensee's project construction schedules. Such sale or disposal to others shall not relieve the Licensee of responsibility for the clearing and disposal of all slash and debris from project lands.

Article 27. The Licensee shall do everything reasonably within its power, and shall require its employees, contractors, and employees of contractors to do everything reasonably within their power, both independently and upon the request of officers of the agency concerned, to prevent, to make advance preparations for suppression of, and to suppress fires on the lands to be occupied or used under the license. The Licensee shall be liable for and shall pay the costs incurred by the United States in suppressing fires caused from the construction, operation, or maintenance of the project works or of the works appurtenant or accessory thereto under the license.

Article 28. The Licensee shall interpose no objection to, and shall in no way prevent, the use by the agency of the United States having jurisdiction over the lands of the United States affected, or by persons or corporations occupying lands of the United States under permit, of water for fire suppression from any stream, conduit, or body of water, natural or artificial, used by the Licensee in the operation of the project works covered by the license, or the use by said parties of water for sanitary and domestic purposes from any stream, conduit, or body of water, natural or artificial, used by the Licensee in the operation of the project works covered by the license.

Article 29. The Licensee shall be liable for injury to, or destruction of, any buildings, bridges, roads, trails, lands,

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or other property of the United States, occasioned by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto under the license. Arrangements to meet such liability, either by compensation for such injury or destruction, or by reconstruction or repair of damaged property, or otherwise, shall be made with the appropriate department or agency of the United States.

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Article 30. The Licensee shall allow any agency of the United States, without charge, to construct or permit to be constructed on, through, and across those project lands which are lands of the United States such conduits, chutes, ditches, railroads, roads, trails, telephone and power lines, and other routes or means of transportation and communication as are not inconsistent with the enjoyment of said lands by the Licensee for the purposes of the license. This license shall not be construed as conferring upon the Licensee any right of use, occupancy, or enjoyment of the lands of the United States other than for the construction, operation, and maintenance of the project as stated in the license.

Article 31. In the construction and maintenance of the project, the location and standards of roads and trails on lands of the United States and other uses of lands of the United States, including the location and condition of quarries, borrow pits, and spoil disposal areas, shall be subject to the approval of the department or agency of the United States having supervision over the lands involved.

Article 32. The Licensee shall make provision, or shall bear the reasonable cost, as determined by the agency of the United States affected, of making provision for avoiding inductive interference between any project transmission line or other project facility constructed, operated, or

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maintained under the license, and any radio installation, telephone line, or other communication facility installed or constructed before or after construction of such project transmission line or other project facility and owned, operated, or used by such agency of the United States in administering the lands under its jurisdiction.

Article 33. The Licensee shall make use of the Commission's guidelines and other recognized guidelines for treatment of transmission line rights-of-way, and shall clear such portions of transmission line rights-of-way across lands of the United States as are designated by the officer of the United States in charge of the lands; shall keep the areas so designated clear of new growth, all refuse, and inflammable material to the satisfaction of such officer; shall trim all branches of trees in contact with or liable to contact the trans-

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mission lines; shall cut and remove all dead or leaning trees which might fall in contact with the transmission lines; and shall take such other precautions against fire as may be required by such officer. No fires for the burning of waste material shall be set except with the prior written consent of the officer of the United States in charge of the lands as to time and place.

Article 34. The Licensee shall cooperate with the United States in the disposal by the United States, under the Act of July 31, 1947, 61 Stat. 681, as amended (30 U.S.C. sec. 601, *et seq.*), of mineral and vegetative materials from lands of the United States occupied by the project or any part thereof: *Provided*, That such disposal has been authorized by the Commission and that it does not unreasonably interfere with the occupancy of such lands by the Licensee for the purposes of the license: *Provided further*, That in the event of disagreement, any question of unreasonable inter-

Order Issuing License (Major)

ference shall be determined by the Commission after notice and opportunity for hearing.

Article 35. If the Licensee shall cause or suffer essential project property to be removed or destroyed or to become unfit for use, without adequate replacement, or shall abandon or discontinue good faith operation of the project or refuse or neglect to comply with the terms of the license and the lawful orders of the Commission mailed to the record address of the Licensee or its agent, the Commission will deem it to be the intent of the Licensee to surrender the license. The Commission, after notice and opportunity for hearing, may require the Licensee to remove any or all structures, equipment and power lines within the project boundary and to take any such other action necessary to restore the project waters, lands, and facilities remaining within the project boundary to a condition satisfactory to the United States agency having jurisdiction over its lands or the Commission's authorized representative, as appropriate, or to provide for the continued operation and maintenance of nonpower facilities and fulfill such other obligations under the license as the Commission may prescribe. In addition, the Commission in its discretion, after notice and opportunity for hearing, may also agree to the surrender of the license when the Commission, for the reasons recited herein, deems it to be the intent of the Licensee to surrender the license.

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Article 36. The right of the Licensee and of its successors and assigns to use or occupy waters over which the United States has jurisdiction, or lands of the United States under the license, for the purpose of maintaining the project works or otherwise, shall absolutely cease at the end of the license period, unless the Licensee has obtained a new license pursuant to the then existing laws and

Order Issuing License (Major)

regulations, or an annual license under the terms and conditions of this license.

Article 37. The terms and conditions expressly set forth in the license shall not be construed as impairing any terms and conditions of the Federal Power Act which are not expressly set forth herein.

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IN TESTIMONY of its acknowledgment of acceptance of all of the provisions, terms and conditions of this license, City of Vanceburg, Kentucky, this ____ day of _____, 19____, has caused its corporate name to be signed hereto by _____, its _____ President, and its corporate seal to be affixed hereto and attested by _____, its _____ Secretary, pursuant to a resolution of its Board of Directors duly adopted on the ____ day of _____, 19 ____, a certified copy of the record of which is attached hereto.

By _____
President

Attest:

Secretary

(Executed in quadruplicate)

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

CITY OF VANCEBURG, KENTUCKY } Project No. 2245

PETITION FOR REHEARING OF THE CITY OF
VANCEBURG, KENTUCKY

The City of Vanceburg, pursuant to § 313(a) and (c) of the Federal Power Act, and § 1.34 of the Commission's Rules of Practice and Procedure, hereby petitions rehearing in the above captioned matter and moves the Commission to make final its order issuing a license to Vanceburg, said order being dated March 29, 1976. Vanceburg further states as follows:

1. Said order in Article 57 (p. 21) requires Petitioner to pay to the United States certain annual charges. Petitioner states that said charges are not proper for the reason that Vanceburg is a municipal corporation of the Commonwealth of Kentucky and the Vanceburg Electric Light Heat and Power System is a corporate entity totally owned by the city pursuant to § 96.520 of the Kentucky Revised Statutes. As such it is a public non-profit body.

2. Vanceburg has an agreement with East Kentucky Power Cooperative (East Kentucky) for certain transmission service and firming up of power and sale of excess power out of said project to East Kentucky. East Kentucky is a generation and transmission cooperative all of whose eighteen members are distribution electric cooperatives in the Commonwealth of Kentucky, organized under Chapter 279 of the Kentucky Revised Statutes. East Ken-

Petition for Rehearing of the City of Vanceburg, Kentucky
tucky and all of its members are non-profit cooperatives and are exempt from Federal income tax under § 501(c) (12) of the Internal Revenue Code of 1954 as amended.

3. Appendix A of the order is further in error because it does not include consideration of the amount of power Vanceburg Electric Light Heat and Power System provides at no cost to the

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municipality of Vanceburg.

WHEREFORE Vanceburg prays:

1. The Commission grant rehearing in the matter herein for the reasons above stated, and
2. Moves the Commission to make final its order granting license herein to Vanceburg.

Respectfully submitted,

(s) Philip P. Ardery
Brown, Todd & Heyburn
1600 Citizens Plaza
Louisville, Kentucky 40202

(s) Marlow W. Cook
Shook, Hardy & Bacon
1776 K Street, N.W.
Washington, D.C. 20006
Counsel for City of Vanceburg

April 27, 1976

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**UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION**

CITY OF VANCEBURG, KENTUCKY } Project No. 2245

**MOTION OF THE CITY OF VANCEBURG, KENTUCKY
TO SUPPLEMENT ITS PETITION FOR REHEARING**

The City of Vanceburg, Kentucky (Vanceburg) hereby moves the Commission to consider the following items as a supplement to its Petition for Rehearing, heretofore filed, and further states:

1. Vanceburg, pursuant to § 313(a) and (c) of the Federal Power Act, and § 1.34 of the Commission's Rules of Practice and Procedure, filed on April 27, 1976 a timely Petition for Rehearing in the above captioned matter.
2. The Commission's Order Issuing License (Major) in this matter was issued on March 29, 1976. Vanceburg's consulting engineers, W. M. Lewis & Associates, Inc., of Portsmouth, Ohio, and Sogreah of Grenoble, France, made every effort to thoroughly review the technical details of the Order prior to the deadline for filing for rehearing but, due to principals of Lewis & Associates being involved in several matters before various state regulatory commissions and the inherent delay in exchange of correspondence with Grenoble, France, the engineers were unable to make a complete analysis of the Order prior to the filing for Rehearing on April 27.

3. After analysis of the Commission's Order by Vanceburg's consulting engineers, it appears appropriate and pertinent to the Commission's consideration that additional

Motion of City of Vanceburg to Supplement Petition, etc.

facts regarding Article 57 of the Order (page 21)—and particularly Appendix A which was attached to and made part of the Order—be presented.

4. Vanceburg is a municipal corporation of the Commonwealth of Kentucky and the Vanceburg Electric Light, Heat and Power System is a corporate entity totally owned by the City pursuant to § 96.520 of the Kentucky Revised Statutes. As such, neither Vanceburg nor Vanceburg Electric Light, Heat and Power System pays Federal or state income tax as does an investor-owned electric utility.

5. The construction of Appendix A properly did not consider income taxes. If it had, as would have been required if Applicant was an investor-owned utility, the factor of 0.1126 in item 1 of Appendix A may well have been 0.1326, assuming an amount of 2 percent for the effect of income taxes. Assuming this same premise, the factor of 0.1181 in item 2 of Appendix A would have been 0.1381. Using these factors, the estimated net power benefits in item 4 of Appendix A would have been

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\$70,100 instead of \$487,400. To illustrate this, a sample calculation is attached hereto. Thus, the annual charge in Article 57(ii) for the purpose of recompensing the United States for the utilization of the Government's Cannelton Locks and Dam and appurtenant structures would be \$35,050.

6. Without giving consideration to the above, Vanceburg loses its advantage of being a municipality and owning and operating a municipal electric system for the benefit of its citizens.

7. Vanceburg filed as part of its Application for License an Economic Study wherein computations similar to those in Appendix A were provided. In this Study, Vanceburg delineated the individual items making up the annual

Motion of City of Vanceburg to Supplement Petition, etc.

costs which the Commission in Appendix A to its Order establishes as 11.26 percent for hydro and 11.81 percent for steam. Since these are different than the factors used by Vanceburg, it will be extremely helpful to Vanceburg's consulting engineers to know the breakdown of these percentages and therefore requests the Commission to make them available.

WHEREFORE, Vanceburg prays that the Commission sustain this Motion to add the foregoing facts as a supplement to Vanceburg's Petition for Rehearing and further prays that:

1. The Commission recalculate Appendix A of its Order, giving Vanceburg full advantage of its municipality status.

2. Article 57(ii) of Part (C) of the Commission's Order be modified to reflect the recalculated Estimated Net Power Benefits of Appendix A.

3. The calculations used by the Commission in Appendix A be made available to Vanceburg.

Respectfully submitted,

(s) Philip P. Ardery
Brown, Todd & Heyburn
1600 Citizens Plaza
Louisville, Kentucky 40202

(s) Marlow W. Cook
Shook, Hardy & Bacon
1776 K Street, N.W.
Washington, D.C. 20006
Counsel for City of Vanceburg

May 14, 1976

Motion of City of Vanceburg to Supplement Petition, etc.

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EXAMPLE OF CALCULATION TO ILLUSTRATE
EFFECT OF INCOME TAXES ON NET
POWER BENEFITS

Computation of Net Power Benefits,
Cannelton Project No. 2245

	Appendix A to Order	Calculation Using 2% Annual Cost to Represent Effect of Income Taxes
1. Cannelton Project No. 2245		
Installed Capacity 70.56 MW		
Est. Average Annual Generation 340 GWh		
Est. Dependable Capacity 32.5 MW		
Estimated Capital Cost, 1/75 \$33,914,000		
Est. Power Supplied to U.S. Government		
Energy — 0.648 GWh		
Capacity — 0.394 MW		
Estimated Annual Cost		
Fixed (33,914) (.1126)	\$3,818,700	$\times 0.1326$ \$4,497,000
O & M & A & G	146,000	146,000
FPC Annual Charge	5,600	5,600
Total	\$3,970,300	\$4,648,600
2. Steam Electric Plant Alternative		
(2-500 MW Units w. Cooling Towers)		
Estimated Capital Cost (1/75)	\$/kW	
Steam Plant	363.74	
Transmission	49.70	
Total	413.44	
Estimated Annual Cost		
Fixed \$(413.44) $\times 0.1181$	48.83	$\times 0.1381$ 57.10
O & M A & G	2.63	2.63
Fuel, fixed & inventory	4.72	4.72
Total	56.18	64.45
Estimated Variable Cost	7.91 mills/kWh	
3. Estimated Annual Value		
Capacity ¹ (31,960-394) kW \times \$56.18/kW		
	$= \$1,773,400 \times \$64.45 =$	\$2,034,400
Energy (340,000-648) MWh \times \$7.91/MWh	$= \$2,684,300$	$= \$2,684,300$
Total		\$4,718,700

Motion of City of Vanceburg to Supplement Petition, etc.

4. Estimated Net Power Benefit

$$\frac{\$4,457,700 - \$3,970,300 = \$487,400}{\$4,718,700 - \$4,648,600 = \$ 70,100}$$

$$\frac{\text{Hydro adjustment}}{\text{dependable capacity}} \times \frac{\text{probability of meeting load-hydro}}{\text{probability of meeting load-steam}} = \frac{32,500 \times \frac{0.87771}{0.89257}}{0.89257} = 31,960$$

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

REHEARING

Before Commissioners: RICHARD L. DUNHAM, *Chairman*;
 DON S. SMITH, JOHN H. HOLLO-
 MAN III, and JAMES G. WATT.

CITY OF VANCEBURG, KENTUCKY } Project No. 2245

**ORDER GRANTING REHEARING FOR THE PURPOSE
 OF FURTHER CONSIDERATION**

(Issued May 27, 1976)

On April 27, 1976, the City of Vanceburg, Kentucky (Vanceburg) filed a timely petition for rehearing of our Order of March 29, 1976, in which we issued a license to Vanceburg to construct, operate, and maintain the Cannelton Project No. 2245. On May 14, 1976, Vanceburg filed a document entitled "Motion of the City of Vanceburg, Kentucky to Supplement its Petition for Rehearing."

The Commission finds:

It is appropriate and in the public interest to grant rehearing for the purpose of further consideration in connection with the above noted documents filed by Vanceburg.

The Commission orders:

Rehearing is hereby granted for the purpose of further consideration in connection with the above noted documents filed by Vanceburg.

By the Commission.

(SEAL)

Kenneth F. Plumb,
 Secretary

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

REHEARING; ANNUAL CHARGES

Before Commissioners: RICHARD L. DUNHAM, *Chairman*;
 DON S. SMITH, JOHN H. HOLLO-
 MAN III, and JAMES G. WATT.

CITY OF VANCEBURG, KENTUCKY } Project No. 2245

ORDER ON REHEARING
 (Issued June 21, 1976)

On April 27, 1976, the City of Vanceburg, Kentucky (Vanceburg) filed a timely petition for rehearing of our order of March 29, 1976, in which we issued a license to Vanceburg to construct, operate, and maintain the Cannelton Project No. 2245. On May 14, 1976, Vanceburg filed a document entitled "Motion of the City of Vanceburg, Kentucky to Supplement its petition for Rehearing." By order of May 27, 1976, we granted rehearing for the purpose of further consideration in connection with these filings. We will discuss these filings separately.

As grounds for the timely petition for rehearing filed on April 27, 1976, Vanceburg states that Vanceburg is a municipal corporation of the Commonwealth of Kentucky and that Vanceburg Electric Light Heat and Power System is a corporate entity owned by the city. Vanceburg further states that East Kentucky Power Cooperative (East Ken-

Order on Rehearing

tucky), with whom Vanceburg has an agreement,¹ is a non-profit, Federal income tax exempt generation and transmission cooperative consisting of eighteen member distribution cooperatives. Vanceburg also states that Appendix A of the order, which sets forth the economic feasibility analysis, fails to consider power provided free of cost by the Vanceburg Electric Light Heat and Power System to the City of Vanceburg. Vanceburg requests that the Commission grant rehearing for the above noted reasons and moves that the order of March 29, 1976, be made final.

While the grounds for the rehearing have been set forth in the rehearing, the relief requested by Vanceburg is not

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clear.² Section 313(a)³ of the Federal Power Act (Act) and Section 1.34⁴ of our Rules of Practice and Procedure contemplate that the relief desired should be specified in an application for rehearing in order that the grounds contained in the rehearing can be evaluated in the context of a requested remedy. *See, Puget Sound Power & Light Company, Project No. 2493, 54 F.P.C. — (July 11, 1975).* By failing to specify a remedy in its rehearing, Vanceburg has not demonstrated precisely how it is aggrieved by the Commission's order of March 29, 1976.

In any event, we construe Vanceburg's application as a request for exemption from the payment of annual charges.

¹This agreement is discussed in our prior order for this project and in the Order Issuing License (Major) and Dismissing Application for Preliminary Permit for the Greenup Projects Nos. 2614 and 2704, which was also issued on March 29, 1976.

²It is not clear, for example, whether Vanceburg requests that Article 57 of the license, which discusses annual charges, be amended or deleted, or whether Vanceburg requests that an exemption from annual charges be granted. The relief is, at best, only implicitly stated. The only relief explicitly requested is that the order of March 29, 1976, be made final.

³16 U.S.C. §825 1(a).

⁴18 C.F.R. §1.34 (1975).

Order on Rehearing

The annual charges, which are specified in Article 57 of the license, fall into three groups: (a) annual charges for the use, occupancy and enjoyment of United States land, (b) annual charges for administration of Part I of the Act, and (c) annual charges for the use of a Government dam. It may well be important to distinguish these groups.⁵ It should be noted that Section 10(e)⁶ of the Act provides that "in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam." Thus, even assuming that Vanceburg would otherwise qualify for an

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exemption from any of those groups of annual charges, we may not be able to grant such an exemption, particularly for annual charges for the use of a Government dam, consistent with the above noted proviso of Section 10(e). However, because we conclude hereinafter that any request for an exemption from annual charges is not properly before us at this time and that, even assuming that such a request is properly before us, Vanceburg's showing in support of the request for exemption is not sufficient, we do not reach the question of whether an exemption from annual charges can be granted consistent with the above noted proviso of Section 10(e). By mentioning the distinctions between and separate problems presented by the various types of annual charges, we do hope to alert Vanceburg to the issues involved so that any future request by Vanceburg for an exemption will focus on these matters in a meaningful fashion.

⁵In instances not involving the use of a Government dam, exemptions have been granted from annual charges for administration of Part I of the Act or for the use, occupancy and enjoyment of lands of the United States. *See, e.g., South Carolina Public Service Authority, Project No. 199; City of Seattle, Wash., Projects Nos. 553, 2144.*

⁶16 U.S.C. §803(e).

Order on Rehearing

Vanceburg's request for an exemption from annual charges, and the grounds which allegedly support the request, are not properly before the Commission at this time. At some time after the project begins generating power, Vanceburg will have an opportunity to submit applications, together with such supporting information, as may be necessary to justify an exemption from the annual charges required by Section 10(e) of the Act. The procedure for filing such an application is set forth in Section 11.24 of our Rules and Regulations. 18 C.F.R. §11.24 (1975). These applications must be filed annually. However, until these applications, with supporting documents, are filed and evaluated, any request for exemption from annual charges is not properly before us. See, *California Oregon Power Co. v. FPC*, 239 F. 2d 426 (D.C. Cir. 1956). No useful purpose would be served by engaging in speculative deliberations on matters such as exemptions from annual charges to be assessed in future years.

The extensive legislative history of Section 10(e) of the Act reveals that it was one of the most controversial sections of the Act. Decisions concerning that section should be made only after all relevant factors are evaluated. Also, of course, there is the possibility that the project might not be constructed and thus annual charges would never be billed.

Even assuming *arguendo* that this request for exemption is properly before us, Vanceburg's request for an exemption from annual charges on the ground that it is a municipality

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and sells power to a cooperative is deficient for another reason. The mere fact that Vanceburg is a municipality and sells an unspecified amount of power to a cooperative is not sufficient to justify an exemption. Vanceburg must

Order on Rehearing

also demonstrate that power from the project is "sold to the public without profit or is used by such State or municipality for State or municipal purposes" or that the project is "primarily designed to provide or improve navigation" within the meaning of Section 10(e) of the Act. The exemption provisions of Section 10(e), particularly the "without profit" provision, have been the subject of litigation. *Power Authority of the State of New York v. FPC*, 339 F. 2d 269 (2nd Cir. 1964); *Central Nebraska Public Power & Irr. Dist. v. FPC*, 160 F. 2d 782 (8th Cir. 1947). Section 11.24 of our Rules and Regulations also discusses these statutory criteria in the context of State or municipal uses, sales of power to the public, sales of power for resale, and interchange of power. The marketing plan for power from this project contemplates that uses and sales in several of these categories will occur; but Vanceburg has not demonstrated how much power from the project will be used in these various categories. In the absence of a showing sufficient to justify an exemption on one or more of these three grounds, we find that Vanceburg is not entitled to a total or partial exemption from the payment of annual charges merely because it is a municipality and sells an unspecified amount of project power to a cooperative. See, *Grand River Dam Authority*, Project No. 2183, 16 F.P.C. 1330 (1956). The threshold showing made by Vanceburg is not adequate when measured against the requirements of the Act.

In connection with the power that Vanceburg Electric Light Heat and Power System provides free of cost to the licensee, City of Vanceburg, it is unclear whether Vanceburg uses this ground as support for its request that a total or partial exemption be granted, or whether it is contending that the annual charges for use of a Government dam specified in Article 57, which was based on Appendix A of our

Order on Rehearing

order, are unreasonable because this factor is not taken into account. Our discussion heretofore concerning Section 313(a) of the Act and Vanceburg's failure to specify a remedy applies equally to this contention.

Insofar as the provision of power free of cost to the City of Vanceburg may affect the reasonableness of the charge specified in Article 57, Vanceburg has not provided factual

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data to support this contention, even assuming that the provision of power free of cost by the Vanceburg Electric Light Heat and Power System to the City of Vanceburg (i.e., the transfer of power by Vanceburg to Vanceburg) is germane to our disposition.⁷ Vanceburg's allegation is insufficient to cause us to change our specific finding that the annual charges for this project are reasonable.

To the extent that the transfer of power from the Vanceburg Electric Light Heat and Power System to the City of Vanceburg is relevant and can be deemed to be for municipal purposes, then this factor goes to the question of exemption, not to the question of the reasonableness of the annual charges. The use of power for municipal purposes is distinguishable from the furnishing of power free of cost to the United States for operation of navigation facilities. This latter use required by Section 11(c)⁸ of the Act does affect the reasonableness of the annual charges, while the former transfer and use for municipal purposes does not affect the reasonableness of the annual charges but rather

⁷The license was issued to the City of Vanceburg. The relevant issue, therefore, is the disposition by the City of Vanceburg of power from this project, not any disposition of power by the Vanceburg Electric Light Heat and Power System to the City of Vanceburg. The Vanceburg Electric Light Heat and Power System is apparently a creature of and agent for the City of Vanceburg, not an independent agent bargaining at arms length with the City.

⁸16 U.S.C. §804(c).

Order on Rehearing

is provided for by the exemption provisions of Section 10(e) of the Act.

Insofar as the provision of power free of cost by the Vanceburg Electric Light Heat and Power System to the City of Vanceburg, may justify a total or partial exemption from the payment of annual charges, this issue is not properly before us at this time for the reasons heretofore noted. When Vanceburg files applications for total or partial exemption, with supporting data, we can then decide the issue of Vanceburg's exemption based on the use of power from the project for State or municipal purposes or on the sale of power from the project to the public without profit.

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Turning to the document filed on May 14, 1976, we are at the outset confronted with a procedural question. While the issue of annual charges is also the subject of this document, Vanceburg now questions the reasonableness of the annual charges. The prior filing of April 27, 1976, which we have heretofore discussed, for the most part did not question the reasonableness of the annual charges but rather addressed the question of exemption from annual charges assumed to be reasonable.

Furthermore, the May 14, 1976, document was filed more than thirty days after the period set forth in Section 313(a) of the Act. The Commission's consistent practice has been to accord documents filed after the thirty day period the status of a motion for reconsideration.⁹ To accord documents filed after the thirty day period the status of rehearings would give parties more than the thirty days authorized by statute, would prevent the orderly disposition of matters contained in these documents, and would entail

⁹See, e.g., Opinion 698-A, *Appalachian Power Company*, Project No. 2317, 52 F.P.C. 317 (1974).

Order on Rehearing

piecemeal, periodic revisions of orders disposing of rehearings. Thus, absent Vanceburg's filing of April 27, 1976, there is no question that the May 14, 1976 document would not be considered a rehearing. While we note that the document filed May 14, 1976, was not filed within thirty days of the date of issuance of our order of March 29, 1976, we also note that this document raises a separate, but related, issue to those issues raised in the timely petition for rehearing. Accordingly, we will, in the exercise of our discretion, consider the matters raised in the May 14, 1976, filing.

Vanceburg objects to the Commission's treatment of Federal and state income taxes in making the economic feasibility analysis set forth in Appendix A of our order. That analysis, which accurately reflects Vanceburg's tax exempt status, compares the estimated annual costs of the proposed hydroelectric project to the estimated annual costs of producing an equivalent amount of power from the least expensive alternative. One half of the difference between these two figures

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is then assessed as the annual charge for use of a Government dam.¹⁰ Vanceburg notes that, if it were an investor owned utility, it would pay Federal and state income taxes which Vanceburg estimates would add two percent to the estimated annual fixed costs of the least expensive alternative. Since the estimated investment cost for the Cannelton Project is greater than the investment cost for the alternative to this project¹¹, any increase in estimated annual fixed charges by treating Vanceburg as an investor owned utility acts to reduce both the economic feasibility of the hydro-

¹⁰Our Order of March 29, 1976, contains a more complete discussion of this method.

¹¹See, Appendix A of our March 29, 1976, order.

Order on Rehearing

electric project and the amount of annual charges to be assessed for use of a Government dam. Vanceburg's calculation on this basis shows that the estimated annual net power benefits of the project are \$70,100 and that a reasonable annual charge for use of the Government dam based thereon is \$35,050. These figures are comparable to the \$487,400 figure for the estimated annual net power benefits and the \$243,700 annual charge figure for use of the Government dam in our order of March 29, 1976. Both of these figures reflect Vanceburg's tax exempt status.¹² Since we disagree with Vanceburg's claim that it should be treated as if it were an investor owned utility for the purpose of computing annual charges for use of a Government dam, we do not reach the issue of whether Vanceburg's suggested two percent figure to account for Federal and state income taxes is appropriate.

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Initially, we note that it is anomalous to consider Vanceburg's tax exempt status when determining the economic feasibility of the project, a treatment which benefits Vanceburg and its application; but then to ignore Vanceburg's tax exempt status, and treat Vanceburg as an investor owned utility, for the purpose of determining annual

¹²Vanceburg's own filing of January 8, 1973, relating to the economic feasibility of both this project and the Greenup Project No. 2614 shows that the estimated annual net benefit were \$1,293,487 for this project and \$1,607,597 for the Greenup Project No. 2614. Using the sharing of the net benefit method, annual charges for the use of a Government dam based on these figures would be approximately \$647,000 for this project and \$804,000 for the Greenup Project No. 2614. While we believe Vanceburg's own analysis of January 1973 overestimates the annual net benefits of these two projects and the annual charges based thereon (i.e. lower figures and charges are appropriate), it is important to note that Vanceburg's own analysis was also predicated on its exemption from Federal and state income taxes.

Order on Rehearing

charges.¹³ Furthermore, Vanceburg's two filings compel the conclusion that Vanceburg wants to be considered as an investor owned utility for the purpose of computing a reasonable annual charge, but as a tax exempt municipality for the purpose of claiming an exemption from reasonable annual charges. We do not believe that Vanceburg can logically claim that according such a chameleon-like status to a municipality is consistent with the Act.

We believe that, in order to be reasonable, annual charges for the use of a Government dam under the sharing of the net benefits method must be based on the *specific* project at issue and the *specific* applicant or licensee for that project. Only by considering the specific facts of each application can we arrive at a reasonable charge, one that will also be equitable to all utilities, whether public or private in character. In this case the specific licensee is a municipality. To treat Vanceburg as an investor owned utility for the purpose of computing annual charges is to give substance to a fiction. We cannot agree with this proposed treatment.

Furthermore, our treatment does not, as Vanceburg suggests, collect as annual charges all the tax savings which Vanceburg would otherwise realize. The practical effect of our treatment is to exact one half, not all, of these tax savings as part of the reasonable annual charge for use of the Government dam. This result, we believe is reasonable. By annual charges we assess a rental for the use of Federal property; and the sharing of the net benefits method appropriately

¹³We can envision situations where the development of power at a Government dam would be economically feasible by a tax exempt entity but not by an investor owned utility. The logic of Vanceburg's position would dictate that the annual charges for development by a tax exempt entity be based on development by an investor owned utility. That annual charge would be zero. We do not believe that this result, which follows from Vanceburg's argument, is appropriate or, for that matter, consistent with the Act.

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considers the value of that Federal property, namely the Government dam, to the specific licensee. Licensees, whether tax paying or tax exempt, pay one half of the value of that Federal property to the licensee. It is improper to treat the use of this property as Vanceburg would have us treat it, especially where, as here, the sharing of the benefits method, in effect, gives Vanceburg full credit for its exemption from Federal and state income taxes on the one half of the net benefits it receives by providing the facilities to generate the power.

The Commission finds:

The documents filed by Vanceburg on April 27 and May 14, 1976, present no facts or legal arguments that require any change or modification of our order of March 29, 1976, issuing a license for the Cannelton Project No. 2245.

The Commission orders:

The above noted documents filed by Vanceburg are hereby denied.

By the Commission.

(SEAL)

Kenneth F. Plumb,
Secretary

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

LICENSE (MAJOR)

Before Commissioners: **RICHARD L. DUNHAM**, *Chairman*;
DON S. SMITH, **JOHN H. HOLLO-**
MAN III, and **JAMES G. WATT**.

CITY OF VANCEBURG, KENTUCKY	}	Project No. 2614
OHIO POWER COMPANY	}	Project No. 2704

ORDER ISSUING LICENSE (MAJOR) AND DIS-
MISSING APPLICATION FOR PRELIMINARY
PERMIT

(Issued March 29, 1976)

The City of Vanceburg, Kentucky (Vanceburg or Applicant) filed on December 17, 1969, and supplemented on August 23, 1970, January 21 and April 21, 1971, November 1, 1972, January 8 and May 1, 1973, and March 8, October 4, December 4, and December 20, 1974, an application under Section 4(e) of the Federal Power Act (Act) for a major license to authorize the construction, operation, and maintenance of the proposed Greenup Project No. 2614, to be located at the U. S. Army Corps of Engineers (Corps) Greenup Locks and Dam on the Ohio River.

Applicant proposes to construct a powerhouse with an installed capacity of 70,560 kW and appurtenant facilities. The project, excluding the transmission line, will be located in Scioto County, Ohio, in the vicinity of the cities of Portsmouth, Ironton, and Wheelersburg, Ohio, and Huntington,

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West Virginia, on the Ohio River between Ohio and Kentucky at the Greenup Locks and Dam, 341.0 miles below Pittsburgh, Pennsylvania. The project will affect lands of the United States, will be located on a navigable waterway of the United States, and will utilize the surplus water or water power from a Government dam within the meaning of the Act. The 71-mile-long, 138 kV transmission line will be located in Greenup, Lewis, and Mason Counties, Kentucky, near the cities and towns of Greenup, South Shore, Vanceburg, Maysville, Washington, Lloyd, South Portsmouth, Saint Paul, Quincy, Garrison, and Tollesboro, Kentucky.

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The Greenup Project No. 2614 will be on the Ohio River on the East (Ohio) side of the Corps' dam, and will include a concrete powerhouse, to be constructed immediately downstream of an existing overflow weir, containing three submerged bulb-type Kaplan hydroelectric generating units with a total installed capacity of 70,560 kW; an intake canal; a tailrace canal; a single-circuit, 71-mile-long, 138 kV transmission line; recreation facilities; and other appurtenant facilities more fully described hereinafter.

About 150 feet of the center of the weir will be removed and a concrete intake canal will be built in its place. The canal will connect the powerhouse to the remaining portions of the weir. The top of the powerhouse will be built at the same elevation as the existing weir (517.0 feet) so that, when flooding conditions make the locks inoperable, the barges and other traffic can pass over the powerhouse. Such traffic currently passes over the weir under similar conditions.

Vanceburg plans to construct a single circuit, 138 kV transmission line of wood pole, H-frame construction, except for the river crossing which would be supported by two steel or aluminum towers. The line would begin at the

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project step-up substation and proceed 4 miles to East Kentucky's Argentum Substation, then 28 miles to Vanceburg's Black Oak Substation, then 13 miles to East Kentucky's Charters Substation, then 26 miles to East Kentucky's Charleston Bottoms Steam-Electric Generating Station (Maysville) for a total of approximately 71 miles. We conclude that the generator leads, the Greenup substation, the 138 kV Greenup-Charleston Bottoms transmission line, and appurtenant facilities are part of the "project" as defined by §3(11) of the Act [16 U.S.C. 796(11)].

Vanceburg will use the power generated at the project to meet its load requirements and will sell any remaining power from the project to East Kentucky Rural Electric Cooperative Corporation of Winchester, Kentucky (EKRECC), in accordance with a Memorandum of Agreement dated February 18, 1970, as amended February 1, 1972, and filed as part of Exhibit U on January 8, 1973. Pursuant to the agreement between EKRECC and Vanceburg, power from the project will be delivered to EKRECC and Vanceburg over the project transmission line. The marketing of power from the project and issues related thereto are more fully discussed hereinafter.

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Notice of the application was given on March 12, 1971, with May 24, 1971, as the last day for filing protests or petitions to intervene. The Ohio Public Utilities Commission filed a notice of intervention pursuant to Section 1.8(a)(1) of the Commission's Rules of Practice and Procedure on March 29, 1971. Ohio Power Company of Canton, Ohio, filed a petition to intervene on May 20, 1971. By order issued April 21, 1972, the Commission granted this petition to intervene.

On June 7, 1974, the Kentucky-Indiana Municipal Power Association (KIMPA) submitted an untimely petition to

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intervene. By order issued December 4, 1974, the Commission accepted the petition for filing and granted the intervention.

Additional notice of the application was given on December 4, 1974, with February 3, 1975, as the last day for filing protests or petitions to intervene. KIMPA filed a protest on February 3, 1975. No other protests, notices of intervention, or petitions to intervene were filed. Issues raised by KIMPA and Ohio Power Company are more fully discussed hereinafter and in the Order Issuing License (Major) for the Cannelton Project No. 2245.

By letter dated June 28, 1971, the Corps stated that the proposed project appeared to fall within the categories of projects which are appropriate for non-Federal development and indicated that the plans of the structures affecting navigation were generally satisfactory. The Corps also reported that: (1) use of the area of the overflow weir for a powerhouse was not anticipated in the design of the dam and, if it is found to be not feasible, the powerhouse may have to be relocated and the construction scheme changed; (2) the powerplant structures must be designed to absorb seismic loads and possible impact from one or more floating barges; (3) planning should be coordinated with the Corps; (4) the Corps should be furnished operating schedules; (5) training walls or deflecting piers may be needed; (6) the U.S. dam was built to be capable of supporting a future Kentucky roadway and/or bridge and the hydro plant should be similarly designed; (7) the transmission line should not interfere with floating cranes or radio communications; (8) Applicant should provide measures to eliminate existing bank erosion; and (9) the recreation use plan is generally satisfactory.

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In light of these statements, the Corps recommended the inclusion of certain standard and special articles. Spe-

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cifically, the Corps recommended that Articles 5 through 9 inclusive of Standard Form L-6 be included in the license. See *Form L-6: Unconstructed Major Project Affecting Navigable Waters and Lands of the United States*, 34 F.P.C. 1114 (1965). Revised versions of these articles have been included in the license as Articles 12 and 21 to 24 inclusive, pursuant to the revision of this Form recently issued. We have not, however, incorporated the Corps' recommendation that Article 12 make specific reference to the reservation in the United States of the right to prescribe the use of water so as to mitigate adverse water quality effects. The right of the United States to prescribe the use of water so as to mitigate adverse water quality effects is subsumed in existing Article 12, thus obviating the necessity for express reference.

The Corps also recommended the inclusion of certain special articles in the license, if issued. These articles relate to: (1) Corps review and approval of design and construction of facilities affecting navigation and public use and recreation; (2) the need for an operating agreement prior to initiation of power operations; (3) provision for the installation of a deflecting pier or wall, if necessary; (4) reimbursement by Licensee of all costs incurred by the Government for the specific and sole purpose of accommodating the power installation; (5) the furnishing of power plant operating schedules to Corps personnel; (6) waiver by Licensee of claims against the United States based on changes in pool levels at the Greenup Locks and Dam and the downstream Anthony Meldahl Locks and Dam; (7) the need for disposal of trash in accordance with Federal, State, and local laws and regulations; and (8) provisions for lights, signals, and protective and warning devices to protect navigational and recreational use. By letter filed January 15, 1973, Vanceburg indicated that it

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did not object to these articles recommended by the Corps. Based on the factual recitals in the Corps' letter and our own independent analysis, we believe that it is in the public interest to incorporate these special articles in the license. These conditions are set forth as Articles 38, 42, 45, and 47 through 51 inclusive.

An additional article suggested by the Corps relates to the release of the Government from liability with respect to the construction, operation, and maintenance of both the

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project and the Greenup Locks and Dam and the payment by Licensee of legal expenses related to suits against the United States. Vanceburg indicated in its letter filed January 15, 1973, that comments would be forthcoming concerning this article. To date Vanceburg has not filed a response. For the reasons set forth in our order issuing a license for the Racine Project No. 2570, we have provided in Article 43 for the release of the United States from liability, arising out of the construction, operation, and maintenance by the United States of the Greenup Locks and Dam, only during the time Vanceburg's agents are engaged in the construction, operation, and maintenance of the power project. *Ohio Power Company*, Project No. 2570, 50 F.P.C. 2020 (1973).

By letter filed December 16, 1974, the Corps stated that it did not object to revision of the application to include the 71-mile-long project transmission line.

By letter filed August 2, 1971, the United States Department of the Interior (Interior) stated that the Greenup Project is one of seven main stem Ohio River continuous record gaging stations, and recommended that Winter-Kennedy piezometer taps be incorporated into the turbines to aid in the measurement and monitoring of the Ohio River flows. Article 8 requires the installation of stream gages, meters, and other measuring devices.

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Interior recommended that, whenever possible, the turbine variable pitch blade be adjusted to accommodate optimum fish passage, and that runner speed be reduced to the slowest functional speed. The desirability of and necessity for these measures for the protection and enhancement of fishery resources can better be evaluated once the project is operational. We are requiring the filing of a revised Exhibit S, to include the conclusions of studies to determine the impact of the project on fishery resources, within three years from the date of commencement of operation of the project.

Interior also stated that the Exhibits R and S were adequate, but suggested that Vanceburg coordinate with the State of Ohio to determine if the proposed observation and fishing platforms are sufficiently large to accommodate the expected number of visitors. Vanceburg indicates in its Exhibit R, which we approve, that it will coordinate with Interior, the Corps, and the State of Ohio before constructing these facilities.

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Finally, Interior suggested that Vanceburg consult with appropriate State agencies regarding the effect of the project, if any, on archeological or historical values and that any investigations for archeological or historical purposes should be funded by Applicant and completed prior to construction. By letter dated February 2, 1973, the Ohio Historical Society indicated that the project would not affect any known prehistoric or historic landmarks eligible for the National Register of Historic Places. The Kentucky Heritage Commission, by letter dated October 8, 1975, recommended a survey of the project area to determine the presence of historical or archeological sites. We have provided, in the license, for historical and archeological surveys consistent with these agencies' recommendations.

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By letter filed February 1, 1973, Vanceburg concurred in Interior's recommendations.

Interior, in its letter dated December 12, 1974, indicated that the project would not affect any interests of the National Park Service but expressed concern over the suitability of the foundations for the project structures and over the measures that would be taken for the control of erosion and sedimentation during construction. We have provided in the license for Corps and Commission review of plans of project structures before construction. Articles 19 and 21 of the license provide for the control of erosion and sedimentation during construction.

With respect to the revised transmission line route, Interior noted that all but seven miles of the transmission line right-of-way would utilize an existing right-of-way, and indicated that mineral and water resources would not be adversely affected by the transmission line right-of-way. Interior recommended that consideration be given to providing recreational opportunities on the planned seven miles of new right-of-way. Pursuant to the provisions of Article 39, Vanceburg is required to consult and cooperate on a continuing basis with appropriate Federal, State, and local environmental agencies for the protection and development of the natural resources and values of the project area. A determination can be made under this article on the desirability of developing the transmission line right-of-way for recreational purposes.

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By letter dated July 9, 1971, the U.S. Department of Agriculture, Forest Service (Forest Service) stated that the project would not affect lands administered by the Forest Service and that construction of the project by the United States is not recommended.

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Additional comments of the Forest Service by letter dated April 27, 1971, and the response to these comments by Vanceburg dated January 5, 1973, relate to the transmission line right-of-way which was subsequently rerouted to utilize existing rights-of-way for 64 miles of its 71 mile length. Thus, these comments are not germane to consideration of the application as supplemented. By letter filed December 24, 1974, the Forest Service commended the decision to reroute the transmission line.

The U.S. Department of Health, Education and Welfare by letter dated April 23, 1971, stated that the sanitation facilities for the recreation area are satisfactory.

By letter dated January 22, 1975, the U.S. Environmental Protection Agency (EPA) recommended that air be injected into water flowing through the turbines in the interest of maintaining a minimum dissolved oxygen level. Article 54 of the license provides for such air injection facilities in the interest of maintaining adequate dissolved oxygen.

EPA also recommended a special article giving the Commission authority to modify project operations and facilities in order to maintain or improve water quality. As heretofore noted in connection with a similar recommendation by the Corps, this authority is reserved in the license, particularly in Articles 9 and 12. With respect to EPA's recommendation that adequate erosion control measures be practiced during the construction of the transmission line to minimize erosion and sedimentation, Articles 19 and 21, which we have heretofore noted, provide for the control of erosion and sedimentation during construction of the line.

By letter dated March 18, 1971, the Kentucky Department of Fish and Wildlife Resources stressed the need for air injection in the turbines and for the recreational facil-

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ities outlined in the Exhibit R. Subsequently, by letter dated November 17, 1974, the Kentucky Department of Fish and Wildlife Resources enclosed a copy of a report discussing their

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standard measures for managing transmission line rights-of-way for wildlife purposes. We cannot say, at this time, that implementation of these measures would be desirable with respect to the specific transmission line right-of-way with which we are concerned, especially in light of the alternative, and possibly conflicting, uses which the right-of-way could support. The desirability of implementing these recommendations should, however, be discussed in the detailed plan required by Article 52 and, subsequently, in the revised Exhibit S filed pursuant to the provisions of Article 55.

By letter dated May 6, 1971, the Ohio Department of Natural Resources stated that the project would not have an adverse environmental impact.

The Ohio Highway Department, in its letter of April 15, 1971, stated that the application does not consider the possibility of construction of a highway bridge across the Ohio River at the Greenup Locks and Dam, nor does the application discuss the compatibility of the substation and power lines with this bridge. By letter dated January 15, 1973, Vanceburg indicated that project facilities would be constructed so as not to interfere with possible future construction of a highway bridge.

The Kentucky Water Pollution Control Commission on September 6, 1972, certified that it has reasonable assurance that applicable water quality standards will not be violated by the project. On October 26, 1972, the Kentucky Water Pollution Control Commission deleted the one year limitation on certification set forth in its September 6, 1972, letter.

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We have examined the environmental aspects of the project. Construction of the project in the vicinity of the Greenup Locks and Dam will result in increased siltation during the excavation for project structures in the vicinity of the weir. Pursuant to provisions of the license heretofore noted, Vanceburg is required to take measures to prevent soil erosion and to excavate in such a manner as to preserve project environmental values and so as not to interfere with land or water traffic.

We have considered fish and wildlife values in the vicinity of the project. Commercial fishing on the Ohio River has been of economic importance in the past. However, commercial fishing has declined in recent years, due partly

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to pollution, decreased profitability, and land use changes. Sport fishing is a popular activity near the dam. Fish common to the Ohio River include mooneye, lake sturgeon, grass pickerel, largemouth bass, white bass, American eel, catfish, freshwater drum, walleye, and sauger.

Wildlife in the project area include bobwhite quail, ring-necked pheasant, squirrel, fox, cottontail rabbit, white-tailed deer, raccoon, muskrat, mink, and beaver. The most abundant game animals in the project area, and those sustaining the greatest hunting pressure, are the cottontail rabbit and the white-tailed deer. Waterfowl occur in the area, but this reach of the Ohio is outside principal waterfowl routes and flyways. No rare or endangered species of fish or wildlife would be affected by the project.

We have considered fish and wildlife aspects of license issuance under the assumption that commercial and sport fishing will increase with improving water quality and advances in fisheries management techniques. The absence of anadromous fish from the Ohio River obviates the need

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for fish passage facilities. Two variables which affect survival rates of fish passing through turbines are the amount of head and the setting of the turbine blade. The low head at the project and the fact that the turbine runner blades can be adjusted are factors which are beneficial to fish survival rates. We are requiring the filing of a revised Exhibit S, based on the results of post-operational studies carried out in cooperation with interested Federal and State agencies, to determine the effect of project operation on the fisheries resources and to measure the effectiveness of the reaeration facilities in maintaining desired dissolved oxygen concentrations. Should additional fish protective measures be warranted, we have reserved sufficient authority under the license to require these measures.

Since 64 miles of the 71 mile transmission line right-of-way will utilize existing rights-of-way which would not have to be widened, only the clearance of seven miles of new transmission line right-of-way will generate potentially significant impacts on wildlife. The seven miles of new rights-of-way would occur in five separate segments. Two segments, approximately 1.8 miles and 1.0 mile in length, would traverse cleared lands. The remaining 4.2 miles of new right-of-way would be about evenly divided among three segments, all of which are timbered lands. Selective

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clearing or clear-cutting, in lieu of shear clearing, should be used during clearance of the transmission line right-of-way, where feasible, to minimize disturbance to the topsoil and the need for revegetation. Any exposed soil surfaces should be stabilized and revegetated as soon as possible. Where the right-of-way is cleared through a forested area, consideration should be given to managing vegetation by applying herbicides to the base of individual trees. This method prevents trees from interfering with power lines

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while maximizing the opportunity for shrubs and vines to occupy the right-of-way. We are requiring Vanceburg to file its detailed plan for avoiding or minimizing any disturbance caused by construction and maintenance of the project works to the natural, scenic, historical, and recreational values of the area. Measures to enhance the value of the transmission line right-of-way for wildlife will be considered in the context of the revised Exhibit S which we require Vanceburg to file.

An existing 30-acre roadside park, consisting of recreational, picnic, and toilet facilities, is situated adjacent to the proposed powerhouse. The facilities were constructed by the Corps of Engineers and are now leased to the Ohio Department of Highways. This park was visited by an estimated 210,000 people in 1970, primarily due to the proximity of the park to U.S. Highway 52. Vanceburg has stated that measures will be taken to minimize disturbances to this park during construction.

In its Exhibit R, Vanceburg proposed the development of recreational facilities, consisting of upper and lower fishing platforms and an observation platform, near the project powerhouse. The fishing platforms would be connected by means of a metal stairway and would be located at the edge of the water on the Ohio side. The fishing and observation platforms would be connected to an existing pedestrian walkway and parking area by means of a roadway bridge. Concrete benches and adequate illumination would be provided at each platform. Upon completion of these proposed recreational facilities, Vanceburg estimates recreational use at the existing and proposed facilities will increase to 500,000 visitors annually and ultimately as many as 800,000 visitors annually. We conclude that the Exhibit R complies with Commission regulations and should be approved as a part of the license.

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The National Register of Historic Places, established under the provisions of the National Historic Preservation Act of 1966,¹ has been consulted. While the Kentucky Heritage Commission, in its letter dated October 8, 1975, indicated that the survey of historic and archeological resources in Kentucky is incomplete, we note that no listed properties, eligible properties, or State inventory properties are located in the vicinity of the project. We have provided for archeological and historical surveys in Articles 40 and 41, respectively.

We have considered alternatives to the project. The alternative of denial of the application was considered. Even assuming that Vanceburg is unsuccessful in attracting industry to utilize the power and, thus, cannot utilize all the power itself, the electric power demands of the combined EKRECC-Vanceburg system will require development of an equivalent amount of power. Furthermore, while electric energy conservation practices may initially reduce the need for this capacity by lessening the growth in energy demand, we believe the public interest would best be served by issuing a license and allowing the development of water resources which otherwise would not be utilized, especially where, as here, the dam is in existence and environmental impacts are not significant. Indeed, because the project is located at an existing Government dam, which can accommodate hydroelectric generating equipment, no other conventional hydroelectric site is considered a reasonable alternative. Since the project will be operated as a run-of-the river facility at an annual plant factor of approximately 50 percent, pumped storage hydroelectric projects and gas turbine facilities, which serve peaking functions, are not considered reasonable alternatives.

¹16 U.S.C. §470.

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Of those alternatives which have a comparable plant factor, fossil fueled steam electric generating units are considered the most viable alternatives. Our studies indicate that a fossil fueled unit sized to meet the needs of a combined EKRECC-Vanceburg system would not provide power as economically as the power to be produced at Greenup. Furthermore, such a fossil fueled unit would utilize a nonrenewable resource with attendant air quality problems.

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The issuance of this license for the construction and operation of Project No. 2614 will provide for the use of a renewable resource to produce an average of 300,000,000 kilowatt-hours of electric energy annually. This will conserve fuel resources equivalent to 480,000 barrels of oil annually.

We have examined the economic and financial feasibility of the project. With respect to financial feasibility, Applicant has demonstrated that it can secure the necessary financing to construct the project through the issuance of revenue bonds. *See discussion infra.*

Based on our studies, a fossil fueled steam-electric generating facility, which is the least expensive alternative energy source, could provide capacity and energy equivalent to that estimated to be generated at the project at an annual cost of \$4,418,800. The annual cost of producing power from the project is estimated to be \$3,963,000. In light of the facts that the estimated cost of producing power from the project is less than the estimated cost of producing an equivalent amount of power from a suitable alternative and that an adequate market for the power has been demonstrated, we conclude that the project is feasible from an economic standpoint.

Section 10(e) of the Act, 16 U.S.C. §803(e), requires the Commission to fix a reasonable annual charge to be paid to

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the United States for the use of a Government dam. The Commission has had occasion to exercise this power many times in the past. Such prior practice has resulted in the consistent use, for a duration exceeding 40 years, of a process known as the "sharing of the net benefits" method. Generally, this method involves calculating the difference between the cost of the proposed hydroelectric development and the cost of producing an equivalent amount of power from the least expensive alternative. This difference is the net benefit to be derived from developing the power potential of the Government dam. Half of this figure is then assessed as the annual charge for use of the Government facility, thus dividing the value of the net benefit equally

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between the licensee and the Government.² The "sharing of the net benefits" method has been used on a consistent basis except when the Commission has approved a settlement of the annual charges issue or when an annual charge has been suggested, usually by another Federal agency, and found to be reasonable as proposed. Indeed, the "sharing of the net benefits" method was used to fix charges in the licenses for Markland Project No. 2211 and Racine Project No. 2570 which, like the Greenup Project, are integrated with Government navigation dams on the Ohio River.³

²For a fuller elucidation of the "sharing of the net benefits" method, see Order Modifying and Adopting Initial Decision of Presiding Examiner and Examiner's Further Decision Upon Reopened Hearing, *The Montana Power Co.*, Project No. 5, 25 F.P.C. 221 (1961), rehearing denied by order issued March 24, 1961, affirmed, *The Montana Power Co. v. FPC*, 298 F. 2d 335 (D.C. Cir. 1962). See also Order On Rehearing Fixing Annual Charges For Use of a Government Dam, *Alabama Power Co.*, Project No. 2165, 36 F.P.C. 659 (1966).

³See Order Issuing License (Major), *Public Service Company of Indiana, Inc.*, Project No. 2211, 25 F.P.C. 1065 (1961); Order Issuing License (Major), *Ohio Power Co.*, Project No. 2570, 50 F.P.C. 2020 (1973).

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On the basis of the cost estimates cited above for the proposed Greenup Project and its least expensive alternative, the annual net benefits deriving from the Greenup Project, as developed by Vanceburg, would be valued at \$455,800. With these benefits shared equally between the United States and Vanceburg, the annual charge for the use of the Greenup facility should thus be \$227,900.

Our determination of the annual charges in this instance is tied closely to the net benefits attributable to operation of the Greenup Project by Vanceburg. Such benefits are derived largely from a comparison of cost estimates, including an estimate of the cost of construction and operation of the Greenup Project at a certain capacity. In view of the

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fact that such capacity, and the attendant benefits to Vanceburg, will be forthcoming by degrees with the construction of the generating units at the project, we find that the payment of annual charges by Vanceburg should be timed and graduated to correspond to the availability of such generating capacity. This approach to timing the assessment of annual charges is consistent, as a matter of policy, with those provisions of Section 11.24(g) of our Regulations⁴ that confer upon municipal licensees an exemption from the payment of annual charges during the construction period," when the project is considered to be "operating without profit." In a similar sense, the Greenup Project could be said to be "operating without benefit," to the extent that potential capacity has not been realized, during the construction period. Hence, for the purposes of this project, the Government dam exception to the exemption provided to municipalities in Section 11.24(g) of the Regulations will be waived. Since the Greenup Project will have three generat-

⁴18 C.F.R. §11.24(g) (1975).

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ing units of equal capacity, one-third of the total annual charge should be assessed with the effective date of commercial operation of each generating unit. These annual charges are provided for in Article 56 of this license.

On October 7, 1969, Ohio Power Company of Canton, Ohio, filed, and on January 16, 1970, supplemented, an application for preliminary permit for the proposed Greenup Project No. 2704 which would also be located at the Corps' Greenup Locks and Dam. This application for preliminary permit conflicts with Vanceburg's application for license. While Vanceburg was issued a preliminary permit for the Greenup Project No. 2614,⁵ Vanceburg failed to file an application for license for this project before the expiration of its preliminary permit. Thus, pursuant to the provisions of Article 7 of its preliminary permit, Vanceburg lost its priority of application for license under Section 5⁶ of the Act on September 30, 1969.

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While Vanceburg had no priority within the meaning of Section 5 of the Act, we need not decide the issue of whether Vanceburg is entitled to a preference within the meaning of Section 7(a)⁷ of the Act. The plans submitted by Vanceburg are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, and Vanceburg has submitted satisfactory evidence of its ability to carry out these plans. The plans submitted by Ohio Power Company in its application for preliminary permit are *not* submitted for the purpose of developing or utilizing the water resources of the region. At most, Ohio Power Company seeks to study the development and

⁵Ohio Power Company, Project No. 2571, *Vanceburg Electric Light, Heat, and Power System, City of Vanceburg, Kentucky*, Project No. 2614, 38 F.P.C. 881 (1967).

⁶16 U.S.C. §798.

⁷*Id.* §800(a).

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utilization of water resources in the vicinity of the Greenup Locks and Dam pursuant to a preliminary permit. We also note that Ohio Power Company, citing financial problems, has requested an extension of time to commence construction of the Racine Project No. 2570. Thus, while we are satisfied that both applicants can carry out the plans of their respective applications, apparently only Vanceburg would be in a position to construct the project if both applicants were applying for a license. In concluding that the application for preliminary permit filed by Ohio Power Company should be dismissed, we wish to emphasize that our procedural and substantive disposition of this aspect of the proceeding might be different if both Vanceburg and Ohio Power Company were applying for a license.

We now discuss the contentions advanced by Ohio Power Company and KIMPA. Ohio Power Company alleges that Vanceburg does not possess the power under Kentucky law to operate a project which will be located both in Kentucky and Ohio, and thus cannot comply with the requirements of Section 9(b)⁸ of the Act. Specifically, Ohio Power Company contends that Vanceburg has failed to comply with the requirements of Section 9(b) of the Act with respect to the right to engage in the business of developing, transmitting, and distributing power within the State of Ohio.

Vanceburg is empowered under the applicable statutes of the State of Kentucky to operate power facilities both within and without its corporate limits.⁹ The words

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"within or without" have been construed to embrace locations outside a State in a situation where a municipality sought to construct a municipal airport located partly in one State and partly in another State. *McLaughlin v. City*

⁸*Id.* §802(b).

⁹KY. REV. STAT. §96.520.

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of *Chattanooga*, 180 Tenn. 638, 177 S. W. 2d 823 (1944). Based on the facts in that case and the statutory language construed, we believe that Vanceburg possesses the right to develop, transmit, and distribute power from a project located both in Kentucky and Ohio.

Even assuming *arguendo* that a Kentucky court would construe the pertinent Kentucky statutes as limiting a municipality's authority only to areas within the State of Kentucky,¹⁰ the failure of Vanceburg to demonstrate its right to engage in the business of developing, transmitting, and distributing power within the State of Ohio would not preclude this Commission from issuing a license to Vanceburg. *First Iowa Hydroelectric Coop. v. FPC*, 328 U. S. 152 (1946). Limitations of State law cannot circumscribe the exercise of Commission authority under the Act. *Washington Public Power Supply System v. Pacific Northwest Power Co.*, 217 F. Supp. 481 (D. Ore. 1963). This principle is particularly applicable where, as here, only United States land will be utilized for project purposes in the State of Ohio. In light of the abovenoted discussion, we dismiss this allegation.

Ohio Power Company also alleges that EKRECC should be the applicant for license. While EKRECC will receive all power that is not needed by Vanceburg from both the Cannelton Project No. 2245 and this project, and while Vanceburg's load is small compared to the output expected from these projects, EKRECC has no right to receive any power from these projects. If Vanceburg is successful in its efforts to increase its load by attracting industry to the area, EKRECC may receive no power from these projects. Therefore, EKRECC's interest in these projects can best be described as contingent during the term of the license.

¹⁰The scope of a municipality's authority outside the State has not, to our knowledge, been addressed by Kentucky courts.

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The contingent interest of EKRECC in this project is less substantial than the non-contingent interest of a municipality in storage rights at a reservoir. Yet, the abovenoted

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interest in storage rights was held not to be sufficient to justify requiring the municipality to be a joint applicant. *State of California v. FPC*, 345 F. 2d 917 (9th Cir. 1965). In this case, EKRECC will not be the legal owner of the project or any portion thereof; nor will EKRECC have a right to receive power from the project. Accordingly, we conclude that EKRECC should not be a joint applicant for license and dismiss this allegation.

Finally, Ohio Power Company alleges that Vanceburg has failed to establish satisfactorily its financial ability to construct and operate the project. Specifically, Ohio Power Company alleges that, while Vanceburg alludes to financial studies by three investment banking firms in its letter dated July 22, 1970, Vanceburg has only filed a letter of assurance from one investment banking firm. Subsequent to Ohio Power Company's filing, and by letter dated November 9, 1972, filed as part of Vanceburg's January 8, 1973, submittal relating to the projects' economic and financial feasibility, the investment banking firm of Connors & Co., Inc. indicated that the proposed securities to be issued by Vanceburg could be successfully marketed at a competitive interest rate assuming that the project was feasible from an economic standpoint and that necessary Federal and State approvals were obtained. This firm further noted that it has been a major factor in financing bonds in the State of Kentucky and Ohio, and offered to purchase these securities. A legal opinion accompanied this letter.

We believe the showing by Vanceburg in the abovenoted letter is sufficient to demonstrate the financial feasibility of the project. Furthermore, we find that Vanceburg's filing

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on financial feasibility is in conformance with our Regulations, which require:

Exhibit G. Statement showing the financial ability of the applicant to carry out the project applied for, together with a statement or explanation of the proposed method of financing the construction thereof. 18 C.F.R. §4.41 (1975).

Accordingly, we dismiss Ohio Power Company's allegation.

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We have also considered the allegations raised by KIMPA. KIMPA alleges that the marketing plan for power from these projects violates KIMPA's rights as a preference customer under the Act. The Act contains no preference for *purchasers* of power from a project. The Act does contain a preference for State and municipal *applicants* for certain types of authorization under the Act.¹¹ This provision is Section 7(a) of the Act. Congress has not, however, provided a preference in the Act for purchasers of power from a project.

In this context, KIMPA alleges that the interpretation KIMPA places on the Act is supported by Congressional policy enunciated in other Federal legislation.¹² The Congressional policy set forth in those statutes, enacted before the advent of rural electric cooperatives, was to provide a preference for municipal purchasers. After the advent of

¹¹See Order Issuing License (Major) for the Cannelton Project No. 2245 for a discussion of the scope of this preference.

¹²Flood Control Act of 1944, 16 U.S.C. §825s; Bonneville Project Act, 16 U.S.C. §832c; Reclamation Act of 1906, 43 U.S.C. §522; Reclamation Project Act of 1939, 43 U.S.C. §485h; Tennessee Valley Authority Act, 16 U.S.C. §831i; Niagara Redevelopment Act, 16 U.S.C. §836. Other statutes containing preference clauses are the Fort Peck Project Act, the Boulder Canyon Project Act, the Falcon Dam Act, the Salt River Reclamation Project Act, and the Eklutna Project Act.

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cooperatives, the Congressional policy has been to provide preferences for both municipal and cooperative purchasers of power. With the exception of the Niagara Project Act,¹³ a Congressional statute concerning a project in an international boundary stream and involving a Treaty with Canada, all other preference legislation concerns the marketing of power from Federally developed projects. The Congressional policy of preference legislation is to provide a preference for municipal and cooperative purchasers of power from Federal projects. We do not believe that the purposes of these Congressional statutes can be related to the purposes of a statute which concerns the development of hydroelectric power by non-Federal entities. *City of Chicago v. FPC*, 385 F. 2d 629 (D.C. Cir. 1967). Absent express Congressional legislation on the subject¹⁴ and given the fact that the

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Act does not provide any preferences in the marketing of power from a licensed project, we find that the marketing plan for the project does not violate KIMPA's alleged rights as a preference customer under the Act.¹⁵

KIMPA further asserts that the marketing plan for power from the Cannelton Project No. 2245 and the Greenup Project No. 2614 violates the Act and the antitrust laws of the United States. This marketing plan, as embodied in the Memorandum of Understanding between EKRECC and Vanceburg, provides, *inter alia*, for the interconnection of Vanceburg and EKRECC; the sale of all power from these projects, not needed by Vanceburg, to EKRECC in ex-

¹³16 U.S.C. §836.

¹⁴n. 12, *supra*.

¹⁵In light of our disposition of this issue, we do not reach the question of whether the public interest would be served by preferring a municipality over a cooperative in the marketing of power from a project.

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change for emergency backup, economy, and firming energy; the coordination of maintenance and repair schedules for all generating facilities; and the compensation to be paid for services rendered. Initially, we note that the Memorandum of Understanding is an agreement which is not subject to Commission scrutiny under Part II of the Act. Municipalities are exempt from Part II of the Act by Section 201(f),¹⁶ and a cooperative is not a "public utility" within the meaning of Section 201(e) of the Act.¹⁷ Furthermore, in light of the fact that the State of Kentucky has expressly empowered a local commission and the State courts to regulate municipal rates and services,¹⁸ we have no rates and services authority over Vanceburg under Section 19¹⁹ of the Act. While

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Commission authority over the Memorandum of Understanding is limited under Both Part I and Part II of the Act, we have examined public interest aspects of this agreement, and the facts and circumstances which led EKRECC and Vanceburg to enter into the agreement, in our disposition of these applications.

When the Commission issued a preliminary permit to Vanceburg for the Greenup Project No. 2614, the Commission put Vanceburg on notice that it would have to demon-

¹⁶16 U.S.C. §824(f).

¹⁷*Id.* §824(e). *Salt River Project Agricultural Improvement and Power District v. FPC*, 391 F. 2d 470 (D.C. Cir. 1968), *cert. denied* 393 U. S. 857 (1968).

¹⁸The pertinent Kentucky statutes provide that the legislative body of the municipality shall, by ordinance, appoint a utility commission consisting of three members with authority over rates and services charged by the municipality. KY. REV. STAT. §96.530. The rates prescribed by this utility commission are subject to judicial scrutiny. *City of Mt. Vernon v. Banks*, 380 S. W. 2d 268 (Ky. 1964).

¹⁹16 U.S.C. §812.

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strate a market for the power that would be generated.²⁰ Vanceburg was well aware of this problem. Before making application for the preliminary permit, Vanceburg had unsuccessfully attempted to convince all municipal electric systems in Kentucky, including two members of KIMPA, the Cities of Paris and Frankfort, to join with Vanceburg in applying for the preliminary permit. Subsequently, in order to demonstrate a market for the power from these projects, Vanceburg entered into the abovenoted agreement with EKRECC on February 18, 1970, as amended February 1, 1972. Thus, in 1971, when the Kentucky-Indiana Power Committee, the predecessor of KIMPA, was formed, Vanceburg had already entered into an agreement to sell all power in excess of Vanceburg's needs to EKRECC. It is in this undisputed factual context that we discuss KIMPA's allegations.

KIMPA alleges that the marketing plan proposed by Vanceburg is violative of the antitrust laws and the Act. The antitrust laws of the United States, and, in particular, Sections 1²¹ and 2²² of the Sherman Act, apply to combinations to restrain competition and attempts to monopolize on the part of *individuals* and *corporations*. The Sherman Act does not apply to restrain a State or activities undertaken pursuant to legislative mandate. *Parker v. Brown*, 317 U. S. 341 (1942). The decision by Vanceburg, a municipality and

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a creature of the State of Kentucky, to sell all power in excess of its needs to EKRECC, is immune from antitrust

²⁰See Article 16 of Vanceburg's preliminary permit. *Ohio Power Company*, Project No. 2571, *Vanceburg Electric Light, Heat, and Power System, City of Vanceburg, Kentucky*, Project No. 2614, 38 F.P.C. 881 (1967).

²¹15 U.S.C. §1.

²²*Id.* §2.

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scrutiny under the Sherman Act. We, therefore, conclude that the marketing plan submitted by Vanceburg is not violative of the antitrust laws of the United States or Section 10(h)²³ of the Act, which follows closely the language of Section 1 of the Sherman Act.

Even assuming *arguendo* that the marketing plan for power from these projects, as embodied in the agreement between Vanceburg and EKRECC, is subject to antitrust scrutiny, there is nothing in the agreement, or the facts or circumstances surrounding the agreement, which is violative of the antitrust laws or Section 10(h) of the Act. Before entering into the agreement, Vanceburg did not refuse to deal with any prospective purchaser of power from these projects. In fact, Vanceburg actively solicited the aid of municipal systems in the State of Kentucky in pursuing their application. Only EKRECC, a cooperative, expressed an interest in the power from these projects surplus to Vanceburg's needs. No antitrust violations can be predicated on Vanceburg's actions prior to entering into the agreement with EKRECC. The antitrust laws were not meant to forbid or restrict normal and usual contracts entered into after a process whereby the power was offered for purchase to potentially interested parties.

But even assuming that, contrary to the fact, Vanceburg did refuse to deal with some party before entering into the agreement, this refusal by Vanceburg would not have been in violation of the antitrust laws. Absent restrictions on resale imposed by Vanceburg or other evidence of a purpose to create or maintain a monopoly, Vanceburg can deal with one possible purchaser of power and refuse to deal with another such purchaser without violating the Sherman Act. KIMPA has not alleged that Vanceburg has imposed

²³16 U.S.C. §803(h).

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restrictions on the resale by EKRECC of power from the project or otherwise attempted to create or maintain a monopoly.

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KIMPA also alleges that the mandatory resale provisions of the Kentucky Indiana Power Pool (KIP Pool)²⁴ require EKRECC to sell any power from these projects in excess of EKRECC's needs to other members of the KIP Pool. This provision, KIMPA contends, precludes KIMPA from obtaining any power from these projects and is anti-competitive and discriminatory. We discuss this contention bearing in mind our conclusion that the marketing plan for power from these projects, as embodied in the agreement, is consistent with the antitrust laws and Section 10(h) of the Act.

Insofar as KIMPA's objection may be construed as an objection to the agreement merely because a party to that agreement is involved in another agreement, the KIP Pool Agreement, which may be inconsistent with the antitrust laws, we believe this objection, based as it is on a "guilt by association" rationale, is insubstantial. The agreement between EKRECC and Vanceburg is valid. We see no reason to deny Vanceburg's applications because of the alleged antitrust implications of EKRECC's signature on another agreement. We conclude that the alleged anticompetitive activities of a potential purchaser (EKRECC) of power in other matters are not reasonably related to a decision on the potential seller's (Vanceburg) application for license and are otherwise insubstantial.

Insofar as KIMPA's allegation concerns the potential resale of power from these projects by EKRECC pursuant

²⁴The KIP Pool is composed of Kentucky Utilities, Public Service Company of Indiana, Indianapolis Power and Light Company, and EKRECC.

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to the provisions of the KIP Pool Agreement, we fail to see why this fact requires denial of Vanceburg's applications. This Commission has already determined that the questions of EKRECC's membership in the KIP Pool, and issues related to the KIP Pool Agreement, raises issues of sufficient import to require an evidentiary hearing.²⁵ If we should decide that

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the mandatory resale provisions of the KIP Pool Agreement are not in the public interest, we may issue an order in those consolidated proceedings which would allow KIMPA to purchase power from these projects, which is in excess of EKRECC's needs, from EKRECC. Thus, we can give no greater relief to KIMPA under Part I of the Act on this issue than under other Parts of the Act which govern matters relating to interconnections, pooling agreements, and rates. These consolidated proceedings are the appropriate and proper forum for the resolution of matters related to the KIP Pool. Furthermore, we reiterate that nothing we could order in this proceeding would afford KIMPA any greater relief on this issue than would be available in the abovenoted consolidated proceedings.

KIMPA alleges that Vanceburg is estopped from denying KIMPA participation in the marketing plan for power

²⁵A new KIP Agreement was entered into in 1971 which provided for EKRECC's membership in the KIP Pool. The new KIP Agreement (Docket No. E-7669), an amendment to that agreement (Docket No. E-7937), and proposed charges in Service Schedule B of that agreement (Docket No. E-8053) were consolidated for evidentiary hearing. *Public Service Company of Indiana, Inc.*, Docket Nos. E-7669 and E-7937, *Kentucky Utilities Company*, Docket No. E-8053, 50 F.P.C. 307 (1973). Antitrust issues raised in these dockets have been further consolidated with similar issues raised in Docket No. E-7704 and Docket No. E-8331 which relate to the issuance by Kentucky Utilities Co. of securities and an increase by Kentucky Utilities Co. of its short-term borrowings, respectively, by order issued February 15, 1974.

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produced at these projects because of oral assurances by Vanceburg and EKRECC that KIMPA would be included in the marketing plan. We have accepted KIMPA's allegation that Vanceburg and EKRECC have provided these oral assurances as true for purposes of decision.

Initially, we note that, if KIMPA truly believed that these oral assurances were sufficient to constitute an estoppel or to modify the written agreement between EKRECC and Vanceburg to allow KIMPA to participate in the marketing plan for power from these projects, this contention is inconsistent with KIMPA's efforts to cause Vanceburg and EKRECC to modify their agreement with a supplemental *written* agreement to which KIMPA would also be a signator. In any event, insofar as we may have authority to rule on this contention in this proceeding, we find that these oral assurances were insufficient to constitute an estoppel against Vanceburg and EKRECC or otherwise to modify the written agreement between

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Vanceburg and EKRECC. We wish to emphasize, however, that our determination should not be construed as foreclosing KIMPA from pursuing any remedies on this issue of contract law which it may have.

Finally, we have examined the two alternative marketing plans, submitted by KIMPA in its petition and rejected by Vanceburg and EKRECC, to determine whether the public interest would be served by these plans. We conclude that neither of these plans is a reasonable alternative to the marketing plan proposed by Vanceburg.

In our Order Issuing License (Major) for the Cannelton Project No. 2245, we discussed the alternative of allowing KIMPA to become the applicant for license for that project. We noted that KIMPA could have filed an application for license for that project. However, KIMPA has not chosen

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to do so. We do not consider it reasonable to consider remote and speculative alternatives or alternatives which the party proposing them has not chosen to actively pursue through the legitimate and proper channels provided for that party under Part I of the Act. The Commission considers applications that are properly before it.

We have also examined the alternative KIMPA originally proposed for consideration by EKRECC and Vanceburg by letter dated November 9, 1973. Under the marketing plan Vanceburg would have a right to 25 mw, EKRECC 37.5 mw, and KIMPA 87.5 mw of the nameplate capacity of these two projects. During the first thirteen years of the license, however, EKRECC would receive more than 37.5 mw and KIMPA less than 87.5 mw.²⁶

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The plan further specified that EKRECC would provide transmission service to both Vanceburg and KIMPA or their designated wheeling agent and that Vanceburg and KIMPA would finance any transmission facilities necessary to deliver power from these projects to EKRECC's transmission system. No rates are specified under the plan, nor is there any provision for other types of service.

This plan was proposed for the purpose of enabling the projects to be financed with tax-exempt securities. These securities, it was alleged, could thus be marketed at a lower rate, with the result that the principal interest on the

²⁶The plan specified that EKRECC would receive an additional 27.5 mw for the first five years which, after five years, would be "recovered" by KIMPA at the rate of 5 mw a year for seven years and 2½ mw in the eighth year. We note a discrepancy here and believe that the 27.5 mw figure is probably incorrect and should instead be 37.5 mw. For the purposes of our discussion of this plan, it is not, however, important to know the correct number. What is important is the fact that EKRECC would obtain more than 25 percent of the nameplate output of the projects during the term of the license.

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capital cost of these projects would be reduced. KIMPA estimated that the difference in annual costs between financing these projects with taxable and tax-exempt securities would be in excess of \$10 per kw.²⁷ However, because EKRECC would

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receive more than 25 percent of the output of the facilities under the plan,²⁸ the bonds which Vanceburg and KIMPA would issue under the plan would qualify as Industrial Development Bonds under Section 103(c) of the Internal Revenue Code and regulations issued thereunder and, thus, would be taxable securities. Therefore, the one justification which KIMPA offers for the plan does not constitute an advantage over the marketing plan submitted by Vanceburg as set forth in the agreement between Vanceburg and EKRECC.

²⁷Vanceburg in its submittal of January 8, 1973, related to the projects' economic and financial feasibility, concluded that the bonds would be classified as Industrial Development Bonds under Section 103(c) of the Internal Revenue Code and regulations thereunder promulgated July 5, 1972, and published August 3, 1972 (37 Fed. Reg. 15485). 26 C.F.R. §1.103 *et seq.* (1975). Because EKRECC has no right to receive any power under the agreement between Vanceburg and EKRECC and, indeed, no megawatt figure is specified, the bonds may not qualify as Industrial Development Bonds. The regulations specify that more than 25 percent of the output of these projects, where output is determined by multiplying the nameplate capacity of the facility by the number of years in the contract term of the issue of obligations issued to provide such facility, must be used by non-exempt persons in order for the bonds to be classified as Industrial Development Bonds. 16 C.F.R. §1.103-7 (1975). If the bonds are not Industrial Development Bonds, under Section 103(c) of the Internal Revenue Code, then the interest on the bonds is tax-exempt under Section 103(a) of the Internal Revenue Code. In this order, however, it is unnecessary for purposes of decision to determine whether the securities to be issued by Vanceburg will be taxable or taxexempt. We have, therefore, assumed that these securities will be taxable.

²⁸n. 26, *supra*.

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We also note that KIMPA does not have the necessary transmission contracts with entities other than Vanceburg and EKRECC by which it could take and beneficially use its share of power under this plan or any plan that might be presented. The members of KIMPA are full or partial requirements customers of Kentucky Utilities Company, Public Service Company of Indiana, and Southern Indiana Gas and Electric Company.²⁹ Since neither Vanceburg nor EKRECC supply any of the members of KIMPA, we are not, therefore, presented with a situation where the actions of Vanceburg and EKRECC could raise potential antitrust issues with respect to KIMPA's failure to supply necessary transmission contracts. *Compare, Conway Corp. v. FPC*, 510 F. 2d 1264 (D.C. Cir. 1975), *cert. granted* 44 U.S.L.W. 3279 (1975).

Finally, KIMPA has not indicated how we could order entities other than Vanceburg, the only applicant for license,³⁰ to make power available to KIMPA in a manner consistent with our authority under the Act.³¹ We, therefore, find, for the abovenoted reasons, that the marketing plans proposed by

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KIMPA, and indeed any marketing plans which include

²⁹The Cities of Paris and Frankfort purchase power from Kentucky Utilities Company. The Cities of Crawfordsville, Washington, and Tipton purchase power from Public Service Company of Indiana. The Cities of Jasper, Huntingburg, and Ferdinand purchase power from Southern Indiana Gas and Electric Company.

³⁰We have heretofore discussed EKRECC's status in these proceedings under Part I of the Act.

³¹While this Commission has ordered wheeling over a project's primary lines under Part I of the Act, *FPC v. Idaho Power Company*, 344 U. S. 17 (1952), we have no authority to order wheeling of power under Part II of the Act. *City of Paris v. Kentucky Utilities*, 41 F.P.C. 45 (1969). We need not address in this proceeding the question of whether we could order wheeling over an applicant's non-primary lines in issuing a license to that applicant under Part I of the Act.

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KIMPA, are not reasonable alternatives to the marketing plan proposed by Vanceburg for these projects.

Having considered the allegations raised by Ohio Power Company and KIMPA and concluded that these allegations are without merit, it is not necessary to consider the additional documents filed by KIMPA and Vanceburg subsequent to June 7, 1974.³²

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Discussion of the matters raised in these documents would not enhance or affect in any manner our disposition of the issues addressed in this order.

³²The documents and the dates upon which they were filed are as follows: Protest of the Kentucky-Indiana Municipal Power Association to the Amended Application for License of Vanceburg, Kentucky, February 5, 1975; Vanceburg's Response to KIMPA's Protest to the Amended Application and Motion, February 24, 1975; Motion to Strike Vanceburg's Response to KIMPA's Protest to the Amended Application and Motion, February 28, 1975; Motion to Bifurcate Project Numbers 2245 & 2614 for Separate Consideration by the Commission and to Convene and Hold an Evidentiary Hearing to Determine the Relative Interests of the Parties in Each Proceeding Before a License Issues for Either Project, March 14, 1975; Motion of Vanceburg to Reject, March 26, 1975; Response of the Kentucky-Indiana Municipal Power Association to the Motion of Vanceburg to Reject, March 31, 1975; Response and Motion of Vanceburg to Motion of Kentucky-Indiana Municipal Power Association Motion to Bifurcate, April 7, 1975; Motion to Convene and Hold a Hearing to Determine Whether East Kentucky Rural Electric Cooperative Corporation is Entitled to a Preference Under Section 7(a) of the Federal Power Act, April 7, 1975; Vanceburg's Response to Motion of Kentucky-Indiana Municipal Power Association, April 21, 1975; KIMPA's Reply to Vanceburg's Response to Motion of Kentucky-Indiana Municipal Power Association, April 21, 1975; Notice and Application for Depositions and Application for Issuance of Subpoenas for Deposition and Production of Documentary Evidence, April 23, 1975; Vanceburg's Response to Kentucky-Indiana Municipal Power Association Notice and Application for Depositions, April 28, 1975; Motion of the Kentucky-Indiana Municipal Power Association to Set Procedural Dates for the Taking of Depositions, May 27, 1975; Vanceburg's Response to Kentucky-Indiana Municipal Power Association's Latest Motion for Taking Depositions, May 28, 1975.

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We have heretofore discussed the expected environmental impacts of construction, operation, and maintenance of the project. Based on these impacts, we conclude that issuance of a license, subject to the terms and conditions hereinafter imposed, would not be a major Federal action significantly affecting the quality of the human environment within the meaning of Section 102(2)(C)³³ of the National Environmental Policy Act of 1969.

The Commission finds:

(1) The Greenup Project No. 2614 would affect lands of the United States, would be located on a navigable waterway of the United States, and would utilize the surplus water or water power from a Government dam.

(2) Applicant is a corporation organized under the laws of the State of Kentucky and has submitted satisfactory evidence of compliance with the requirements of all applicable State laws insofar as necessary to effectuate the purposes of a license for the project.

(3) Public notice of the filing of the application was given on March 12, 1971, and December 4, 1974. A notice of intervention was filed by the Public Utilities Commission of Ohio. A timely petition to intervene, filed by the Ohio Power Company on May 20, 1971, was granted by Commission order issued April 21, 1972. A late petition to intervene, filed by the Kentucky-Indiana Power Association on June 7, 1974, was granted by Commission order issued December 4, 1974.

(4) For the reasons set forth in this Order Issuing License (Major) and Dismissing Application for Preliminary Permit and in the Order Issuing License (Major) for the Cannelton Project No. 2245, the allegations raised by Ohio Power Company and Kentucky-Indiana Municipal

³³42 U.S.C. §4332(2)(C).

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Power Association (KIMPA) present no disputed facts or facts which have not been accepted as true for the purpose of decision. Therefore, an evidentiary hearing is neither warranted nor in the public interest.

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(5) East Kentucky Rural Electric Cooperative Corporation (EKRECC) should not be a joint applicant with Vanceburg for a license for this project.

(6) The Federal Power Act (Act) contains no preference for purchasers of power from a project.

(7) The marketing plan for power from this project and the Cannelton Project No. 2245 does not violate KIMPA's alleged rights as a preference customer under the Act.

(8) The marketing plan for power from this project and the Cannelton Project No. 2245 does not violate the antitrust laws of the United States or Section 10(h) of the Act.

(9) Vanceburg is not estopped from denying KIMPA participation in the marketing plan for power from this project and the Cannelton Project No. 2245.

(10) Neither alternative marketing plan proposed by KIMPA for power from this project and the Cannelton Project No. 2245, and indeed any marketing plan which would include KIMPA, is a reasonable alternative to the marketing plan proposed by Vanceburg.

(11) An application for preliminary permit for the Greenup Project No. 2704 was filed by Ohio Power Company. Public notice of this application was given on December 18, 1969. Notices of intervention were filed by the Public Utilities Commission of Ohio on February 24, 1970, and by Vanceburg on December 24, 1969.

(12) The plans filed by Vanceburg in its application are best adapted to develop, conserve, and utilize in the public interest the water resources of the region. Accordingly,

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the abovenoted application for preliminary permit filed by Ohio Power Company should be dismissed.

(13) Vanceburg has submitted satisfactory evidence of its financial ability to construct, operate, and maintain the proposed project.

(14) Subject to the terms and conditions hereinafter imposed, the project does not adversely affect a Government dam, nor will the issuance of a license therefor, as hereinafter provided, affect the development of any water resources for public purposes which should be undertaken by the United States.

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(15) Subject to the terms and conditions hereinafter imposed, the project will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes.

(16) The estimated cost of developing the project compared to the estimated cost of developing suitable alternative sources of power is reasonable.

(17) The installed horsepower capacity of the project hereinafter authorized for the purpose of computing the capacity component of the administrative annual charge is 94,100 horsepower, and the amount of annual charges based on such capacity to be paid under the license for the project for the cost of administration of Part I of the Act is reasonable.

(18) For the purpose of recompensing the United States for the use of the Government's Greenup Locks and Dam and appurtenant structures, the annual charge for such use is hereinafter authorized to be \$227,900, which charge is reasonable, is based upon the "sharing of the

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net benefits" method, and may be readjusted in the future pursuant to Section 10(e) of the Act.

(19) It is desirable to reserve for a later date a determination as to the amount of annual charges for the use, occupancy and enjoyment of lands of the United States.

(20) Subject to the terms and conditions hereinafter imposed, the plans of the structures affecting navigation have been approved by the Corps of Engineers.

(21) The term of the licensee hereinafter authorized is 50 years, which term is reasonable.

(22) The exhibits designated and described in Paragraph (B) below conform to the Commission's Rules and Regulations and should be approved as part of the license for the project to the extent indicated herein.

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The Commission orders:

(A) This license is hereby issued to the City of Vanceburg, Kentucky (hereinafter Licensee), under Section 4(e) of the Federal Power Act for a period of 50 years effective the first day of the month in which this license is issued for the construction, operation and maintenance of the Greenup Hydroelectric Project No. 2614 located on the Ohio River and affecting navigable waters of the United States, and utilizing surplus water or waterpower from and affecting the Greenup Locks and Dam of the United States and appurtenant lands acquired by the Corps of Engineers, subject to the terms and conditions of the Act which is incorporated herein by reference as a part of this license, and subject to such rules and regulations as the Commission has issued or prescribed under the provisions of the Act.

(B) The Greenup Project consists of:

(i) all lands constituting the project area and enclosed by the project boundary or the limits of which are otherwise defined, and/or interests in such lands

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necessary or appropriate for the purposes of the project, whether such lands or interests therein are owned or held by the applicant or by the United States; such project area and project boundary being more generally shown and described by certain exhibits which formed part of the application for license and which are designated and described as follows:

<u>Exhibit</u>	<u>FPC Number</u>	<u>Title</u>
J (Sheet 1)-K	2614-3	Map of Project Area
J (Sheet 2)	2614-13	Map of Project Area

approved only to the extent that they show the general location of the project.

(ii) project works to be located in the space available on the Ohio side of the river east of Gate Pier No. 10 including: (1) a short concrete intake canal approximately 65 feet long and 150 feet wide, connected to (2) a power plant intake structure which in turn connects to (3) a concrete powerhouse

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section about 185 feet long, 175 feet wide, and with a rooftop elevation of 517.0 feet, consisting of three parallel concrete conduits enclosing three horizontal-axis, bulb-type kaplan turbines each rated at 33,000 hp connected to three generators each rated at 24,000 kva with a .98 power factor; (4) a concrete tailrace canal approximately 100 feet long and 154 feet wide; (5) the generator leads; (6) the Greenup substation; (7) a single-circuit 138 kv transmission line extending from the power plant four miles to East Kentucky Rural Electric Cooperative Corporation's (EKRECC) Argentum Substation, then 28 miles to Licensee's Black Oak Substation, then 13 miles to EKRECC's Charters Substation, then 26 miles to EKRECC's Charleston

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Bottoms Generating Station (Marysville); (8) recreational facilities consisting of fishing and observation platforms; and (9) appurtenant facilities—the location, nature and character of which are more specifically shown and described by the exhibits hereinbefore cited and by certain other exhibits which also form part of the application for license and which are designated and described as follows:

<u>Exhibit L</u>	<u>FPC No.</u>	<u>Showing</u>
1	2614-5	General Layout
2	2614-6	Powerhouse Plan View
3	2614-7	Transverse Section through Powerhouse
4	2614-8	Typical Section of Powerhouse

Exhibit M, consisting of nine typewritten pages, filed December 17, 1969, entitled "General Description of Mechanical, Electrical, and Transmission Equipment," except that portion of Exhibit M describing the 85-mile-long transmission line and facilities appurtenant thereto.

Exhibit R, consisting of two typewritten pages and one drawing titled "Recreational Use Plan," FPC No. 2614-10.

(iii) all of the structures, fixtures, equipment, or facilities used or useful in the maintenance and operation of the project and located within the project area, and such other property as may be used or useful

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in connection with the project or any part thereof, whether located on or off the project area, if and to the extent that the inclusion of such property as part of the project is approved or acquiesced in by the Commission; together with all riparian or other rights, the

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use or possession of which is necessary or appropriate in the maintenance or operation of the project.

(C) This license is also subject to the terms and conditions set forth in Form L-6 (revised October, 1975) entitled "Terms and Conditions of License for Unconstructed Major Project Affecting Navigable Waters and Lands of the United States," which terms and conditions, designated as Articles 1 through 37, are attached hereto and made a part hereof, except for Articles 7 and 20, which are hereby deleted for the purposes of this license, and subject to the following special conditions set forth herein as additional articles:

Article 38. The Licensee shall dispose of all temporary structures, unused timber, brush, refuse, or other unneeded material resulting from the clearing of lands or from the maintenance or alteration of the project works. Disposal of the material shall be done with due diligence and to the satisfaction of the authorized representative of the Commission and in accordance with appropriate Federal, State, and local statutes and regulations.

Article 39. The Licensee shall, during the construction and operation of the project, continue to consult and cooperate with the Fish and Wildlife Service of the U. S. Department of the Interior and other appropriate Federal, State, and local agencies for the protection and development of the natural resources and values of the project area.

Article 40. The Licensee shall, prior to commencement of construction, consult and cooperate with appropriate Federal, State, and local agencies to determine the extent of archaeological survey and salvage excavations, if any, that may be necessary prior to any

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construction activities, and shall provide funds in a reasonable amount for any needed surveys or salvage excavations to be conducted.

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Article 41. The Licensee shall cooperate with appropriate State and local agencies in the identification of historical structures, if any, within the project area and, if necessary, shall cooperate in developing a plan for the protection or relocation of such structures.

Article 42. The Licensee shall, to the satisfaction of the Commission's authorized representative, install and operate such signs, lights, sirens or other devices below the powerhouse to warn the public of fluctuations in flow from the project, and shall install such signs, lights and other safety devices above the powerhouse intakes, as may be reasonably needed to protect the public in its recreational use of project lands and waters.

Article 43. The Licensee shall release and save and hold the Government harmless from any and all causes of action, suits-at-law or equity, or claims or demands, or from any liability of any nature whatsoever, for and on account of any property damage (including damages thereto of taking of real estate or interests therein by reason of the flooding and/or erosion of such property by impoundments and/or discharges for purposes other than operation and maintenance of the Greenup Locks and Dam project for navigation purposes), personal injury or death arising out of the construction, operation, and maintenance of the power project; and the Licensee shall release and save and hold the Government harmless from any and all causes of action, suits-at-law or in equity, or claims or

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demands or from any liability of any nature whatsoever for and on account of any property damage, or personal injury, or death of any of the Licensee's employees, contractors, licensees, agents, permittees, or assignees during the time they are engaged in the construction, operation, and maintenance of the power project, and arising out of the construction, operation, and maintenance by the United States of the Greenup Locks and Dam project. In partial support of its obligations under this clause, Licensee shall defend or, at the option of the Government, shall reimburse the Government for all costs of defending all claims and suits-at-law or in equity instituted against the United States for any damage caused or alleged to have been caused by operation of the power

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project, or the operation of the Greenup Locks and Dam project, in aid of the power project, including payment to landowners for any inverse or physical taking of real estate or interest therein adjudged by any court of competent jurisdiction by verdict, decision, or agreement of parties, to have resulted from the operation of the power project or the operation of the Greenup Locks and Dam project in aid of such power project (including litigation in which the United States is not a defendant); and, on request of the United States, shall properly record in the land records of the appropriate county and State all such judgments of said courts, and shall procure and record any other evidence of such taking, and payment therefor, reasonably required by the United States, running to Licensee or to the United States, as determined appropriate by the United States, including takings adjudged as aforesaid by courts of competent jurisdiction and agree-

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ments made between the Licensee and landowners in compromise or avoidance of litigation.

Article 44. The Licensee shall commence construction of the project, within two years from the effective date of the license, shall thereafter in good faith and with due diligence prosecute such construction, and shall complete construction of such project works within five years from the effective date of the license.

Article 45. The design and construction of all facilities that will be an integral part of the dam or that could affect the integrity of the navigation system, as well as facilities for public use and recreation, shall be subject to the review and approval of the District Engineer, Corps of Engineers, Huntington, West Virginia.

Article 46. The Licensee shall submit, in accordance with the Commission's rules and regulations, revised Exhibit L drawings showing final designs of the project works and a revised Exhibit M. Licensee shall not begin construction of any such project structures until the Commission has approved such exhibits.

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Article 47. The Licensee shall, prior to initiation of power operations, enter into an agreement with the District Engineer, Corps of Engineers, Huntington, West Virginia, specifying details of an operating plan to protect Federal interests, including limitations on fluctuations of pools in the Greenup reservoir and the downstream Captain Anthony Meldahl reservoir. This agreement shall be subject to review, upon the request of either party, on the basis of operating experience.

Article 48. In the event the Chief of Engineers shall deem it necessary for the protection of navigation and shall so notify the Commission, the Commission,

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after notice and opportunity for hearing, may require the Licensee at no expense to the Federal Government, and within one year from said date of notification, to construct a deflecting pier or wall in the river below the dam to deflect the current caused by discharge from the power plant away from entrances to the locks. The Licensee shall maintain such facilities at its expense. The design, location, and time of construction of such deflecting pier or wall shall be subject to the approval of the Chief of Engineers.

Article 49. The Licensee shall reimburse the Government for all costs, including design and construction costs incurred by the Government for the specific and sole purpose of accommodating the Licensee's power installation. These costs will be in addition to the annual payments specified in paragraph (ii) of Article 56. Arrangements for payment shall be made with the Chief of Engineers, U. S. Department of the Army, at the time of commencement of construction of the project.

Article 50. The Licensee shall furnish designated Corps of Engineers operating personnel with proposed power operating schedules of the power plant, including information on operation of air vents, if pertinent, in advance of power plant operation and revisions thereof on reasonable notice.

Article 51. The Licensee shall have no claim against the United States arising from the effect of any changes made or not made in the pool levels at Greenup Locks and Dam or the downstream Anthony Meldahl locks and dam for navigation or other beneficial purposes.

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Article 52. The Licensee shall avoid or minimize any disturbance caused by construction, operation, and maintenance of the project works to the natural, scenic, historic, and recreational values of the area, blending project works with the natural view, and revegetating, stabilizing, and landscaping all construction areas. Within one year from the date of issuance of this license, the Licensee shall file with the Commission its detailed plan to avoid or minimize any disturbance to such values caused by construction, operation, and maintenance of the project works. The plan, including an architectural rendering of the major project features, shall be prepared after consultation with a professional land use planner and appropriate Federal, State, and local agencies; and shall give due consideration to the provisions of the Commission's Order No. 414, issued November 27, 1970. The Commission reserves the right, after notice and opportunity for hearing, to prescribe any changes in the plans that the public interest may warrant.

Article 53. Within one year after commencement of construction of the project and after consultation with the Corps of Engineers concerning the location of the proposed project boundary, the Licensee shall file a revised Exhibit F and for Commission approval, revised Exhibits J and K delineating the proposed project boundary and the amount of United States lands within said boundary. The Licensee shall acquire title in fee to all lands, other than lands of the United States and lands for transmission line rights-of-way, within the project boundary shown on the Exhibits J and K approved by the Commission pursuant to this article.

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Article 54. The Licensee, following consultation with appropriate water quality agencies, shall install a continuously recording dissolved oxygen monitoring system during generation, and shall maintain records of the data obtained from the monitoring system and make them available to appropriate agencies upon request. The Licensee shall install facilities for the admission of air into the draft tubes and shall, during power generation periods, operate such facilities whenever the dissolved oxygen concentration in the project discharge declines below 5.0 mg/l.

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Article 55. The Licensee shall conduct studies in cooperation with the Kentucky Department of Fish and Wildlife Resources and the Ohio Department of Natural Resources to determine any effects the project will have on fishery resources and, within three years from the date of commencement of operation of the project, shall file for Commission approval a revised Exhibit S prepared in accordance with Section 4.41 of the Commission Regulations which shall include, *inter alia*, the conclusions of said studies and a summary of the operation of the air admission and dissolved oxygen monitoring systems in maintaining desired dissolved oxygen levels in the project discharge as required in Article 54 of this license.

Article 56. The Licensee shall pay to the United States the following annual charges:

(i) For the purpose of reimbursing the United States for the cost of administration of Part I of the Act, a reasonable annual charge as determined by the Commission, in accordance with its regulations in effect from time to time, the authorized installed capacity for such purpose being 94,100 horsepower;

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(ii) For the purpose of recompensing the United States for the utilization of the Government's Greenup Locks and Dam and appurtenant structures, \$227,900, which charge may be readjusted in the future pursuant to the provisions of Section 10(e) of the Act, and which shall be assessed as follows: (a) \$75,967, effective as of the date of commercial operation of the first generating unit; (b) \$151,934, effective as of the date of commercial operation of the second generating unit; and (c) \$227,900, effective as of the date of commercial operation of the third generating unit;

(iii) For the purpose of recompensing the United States for the use, occupancy, and enjoyment of its lands, an amount to be hereafter determined by the Commission.

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(D) The Exhibits designated and described in Paragraph (B) above are hereby approved to the extent indicated therein and made a part of the license.

(E) The application for preliminary permit filed by Ohio Power Company for the Greenup Project No. 2704 is hereby dismissed.

(F) This order shall become final 30 days from the date of its issuance unless application for rehearing shall be filed as provided in Section 313(a) of the Act, and failure to file such an application shall constitute acceptance of this license. In acknowledgment of the acceptance of this license it shall be signed for the Licensee and returned to the Commission within 60 days from the date of issuance of this order.

By the Commission.

(S E A L)

Kenneth F. Plumb,
Secretary.

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APPENDIX A

Computation of Net Power Benefits,
Greenup Project No. 2614

1. Greenup Project No. 2614

Installed Capacity	70.56 MW	
Est. Average Annual Generation	300 GWh	
Est. Dependable Capacity	37.5 MW	
Estimated Capital Cost (1/75)	\$33,848,600	
Est. Power to be supplied to U. S. Government		
Energy	— 0.617 GWh	
Capacity	— 0.375 MW	
Estimated Annual Cost (\$1,000)		
Fixed (\$33,848.6) x 0.1126		3811.4
O & M A & G		146.0
FPC Annual Charge		5.6
Total		3963.0

2. Steam Electric Plant Alternative

(2-500 MW Units w. Cooling Towers)		
Estimated Capital Cost (1/75)	\$/kW	
Steam Plant		363.74
Transmission		49.70
Total		413.44
Estimated Annual Cost		
Fixed (\$413.44) x 0.1181		48.83
O & M A & G		2.63
Fuel, fixed & inventory		4.72
Total		56.18

Estimated Variable Cost 7.91 mills/kWh

3. Estimated Annual Value

Capacity ¹ (36,877-375) kW x \$56.18/kW	= \$2,050,700
Energy (300,000-617) MWh x \$7.91/MWh	= \$2,368,100
Total	\$4,418,800

4. Estimated Net Power Benefits

\$4,418,800 — \$3,963,000 = \$455,800

$$\frac{\text{Hydro adjustment}}{\text{dependable capacity}} \times \frac{\text{probability of meeting load-hydro}}{\text{probability of meeting load-steam}} = \frac{0.87771}{0.89257} = 36,877$$

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Form L-6

(Revised October, 1975)

FEDERAL POWER COMMISSION

TERMS AND CONDITIONS OF LICENCE FOR UNCONSTRUCTED MAJOR PROJECT AFFECTING NAVIGABLE WATERS AND LANDS OF THE UNITED STATES

Article 1. The entire project, as described in this order of the Commission, shall be subject to all of the provisions, terms, and conditions of the license.

Article 2. No substantial change shall be made in the maps, plans, specifications, and statements described and designated as exhibits and approved by the Commission in its order as a part of the license until such change shall have been approved by the Commission: *Provided, however,* That if the Licensee or the Commission deems it necessary or desirable that said approved exhibits, or any of them, be changed, there shall be submitted to the Commission for approval a revised, or additional exhibit or exhibits covering the proposed changes which, upon approval by the Commission, shall become a part of the license and shall supersede, in whole or in part, such exhibit or exhibits theretofore made a part of the license as may be specified by the Commission.

Article 3. The project works shall be constructed in substantial conformity with the approved exhibits referred to in Article 2 herein or as changed in accordance with the provisions of said article. Except when emergency shall require for the protection of navigation, life, health, or property, there shall not be made without prior approval of the Com-

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mission any substantial alteration or addition not in conformity with the approved plans to any dam or other project works under the license or any substantial use of project lands and waters not authorized herein; and any emergency alteration, addition, or use so made shall thereafter be subject to such modification and change as the Commission may direct. Minor changes in project works, or in uses of project lands and waters, or divergence from such approved exhibits may be made if such changes will not result in a decrease in efficiency, in a material increase in cost, in an adverse environmental impact, or in impairment of the general scheme of development; but any of such minor changes made without the prior approval of the Commission, which in its judgment have produced or will produce any of such results, shall be subject to such alteration as the Commission may direct.

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Upon the completion of the project, or at such other time as the Commission may direct, the Licensee shall submit to the Commission for approval revised exhibits insofar as necessary to show any divergence from or variations in the project area and project boundary as finally located or in the project works as actually constructed when compared with the area and boundary shown and the works described in the license or in the exhibits approved by the Commission, together with a statement in writing setting forth the reasons which in the opinion of the Licensee necessitated or justified variation in or divergence from the approved exhibits. Such revised exhibits shall, if and when approved by the Commission, be made a part of the license under the provisions of Article 2 hereof.

Article 4. The construction, operation, and maintenance of the project and any work incidental to additions or alterations shall be subject to the inspection and supervision

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of the Regional Engineer, Federal Power Commission, in the region wherein the project is located, or of such other officer or agent as the Commission may designate, who shall be the authorized representative of the Commission for such purposes. The Licensee shall cooperate fully with said representative and shall furnish him a detailed program of inspection by the Licensee that will provide for an adequate and qualified inspection force for construction of the project and for any subsequent alterations to the project. Construction of the project works or any feature or alteration thereof shall not be initiated until the program of inspection for the project works or any such feature thereof has been approved by said representative. The Licensee shall also furnish to said representative such further information as he may require concerning the construction, operation, and maintenance of the project, and of any alteration thereof, and shall notify him of the date upon which work will begin, as far in advance thereof as said representative may reasonably specify, and shall notify him promptly in writing of any suspension of work for a period of more than one week, and of its resumption and completion. The Licensee shall allow said representative and other officers or employees of the United States, showing proper credentials, free and unrestricted access to, through, and across the project lands and project works in the performance of their official duties. The Licensee shall comply with such rules and regulations of general or special applicability as the Commission may prescribe from time to time for the protection of life, health, or property.

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Article 5. The Licensee, within five years from the date of issuance of the license, shall acquire title in fee or the right to use in perpetuity all lands, other than lands of the United States, necessary or appropriate for the construc-

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tion, maintenance, and operation of the project. The Licensee or its successors and assigns shall, during the period of the license, retain the possession of all project property covered by the license as issued or as later amended, including the project area, the project works, and all franchises, easements, water rights, and rights of occupancy and use; and none of such properties shall be voluntarily sold, leased, transferred, abandoned, or otherwise disposed of without the prior written approval of the Commission, except that the Licensee may lease or otherwise dispose of interests in project lands or property without specific written approval of the Commission pursuant to the then current regulations of the Commission. The provisions of this article are not intended to prevent the abandonment or the retirement from service of structures, equipment, or other project works in connection with replacements thereof when they become obsolete, inadequate, or inefficient for further service due to wear and tear; and mortgage or trust deeds or judicial sales made thereunder, or tax sales, shall not be deemed voluntary transfers within the meaning of this article.

Article 6. In the event the project is taken over by the United States upon the termination of the license as provided in Section 14 of the Federal Power Act, or is transferred to a new licensee or to a non-power licensee under the provisions of Section 15 of said Act, the Licensee, its successors and assigns shall be responsible for, and shall make good any defect of title to, or of right of occupancy and use in, any of such project property that is necessary or appropriate or valuable and serviceable in the maintenance and operation of the project, and shall pay and discharge, or shall assume responsibility for payment and discharge of, all liens or encumbrances upon the project or

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project property created by the Licensee or created or incurred after the issuance of the license: *Provided*, That the provisions of this article are not intended to require the Licensee, for the purpose of transferring the project to the United States or to a new licensee, to acquire any different title to, or right of occupancy and use in, any of such project property than was necessary to acquire for its own purposes as the Licensee.

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Article 7. The actual legitimate original cost of the project, and of any addition thereto or betterment thereof, shall be determined by the Commission in accordance with the Federal Power Act and the Commission's Rules and Regulations thereunder.

Article 8. The Licensee shall install and thereafter maintain gages and stream-gaging stations for the purpose of determining the stage and flow of the stream or streams on which the project is located, the amount of water held in and withdrawn from storage, and the effective head on the turbines; shall provide for the required reading of such gages and for the adequate rating of such stations; and shall install and maintain standard meters adequate for the determination of the amount of electric energy generated by the project works. The number, character, and location of gages, meters, or other measuring devices, and the method of operation thereof, shall at all times be satisfactory to the Commission or its authorized representative. The Commission reserves the right, after notice and opportunity for hearing, to require such alterations in the number, character, and location of gages, meters, or other measuring devices, and the method of operation thereof, as are necessary to secure adequate determinations. The installation of gages, the rating of said stream or streams, and the determination of the flow thereof, shall be under the

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supervision of, or in cooperation with, the District Engineer of the United States Geological Survey having charge of stream-gaging operations in the region of the project, and the Licensee shall advance to the United States Geological Survey the amount of funds estimated to be necessary for such supervision, or cooperation for such periods as may be mutually agreed upon. The Licensee shall keep accurate and sufficient records of the foregoing determinations to the satisfaction of the Commission, and shall make return of such records annually at such time and in such form as the Commission may prescribe.

Article 9. The Licensee shall, after notice and opportunity for hearing, install additional capacity or make other changes in the project as directed by the Commission, to the extent that it is economically sound and in the public interest to do so.

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Article 10. The Licensee shall, after notice and opportunity for hearing, coordinate the operation of the project, electrically and hydraulically, with such other projects or power system and in such manner as the Commission may direct in the interest of power and other beneficial public uses of water resources, and on such conditions concerning the equitable sharing of benefits by the Licensee as the Commission may order.

Article 11. Whenever the Licensee is directly benefited by the construction work of another licensee, a permittee, or the United States on a storage reservoir or other headwater improvement, the Licensee shall reimburse the owner of the headwater improvement for such part of the annual charges for interest, maintenance, and depreciation thereof as the Commission shall determine to be equitable, and shall pay to the United States the cost of making such deter-

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mination as fixed by the Commission. For benefits provided by a storage reservoir or other headwater improvement of the United States, the Licensee shall pay to the Commission the amounts for which it is billed from time to time for such headwater benefits and for the cost of making the determinations pursuant to the then current regulations of the Commission under the Federal Power Act.

Article 12. The United States specifically retains and safeguards the right to use water in such amount, to be determined by the Secretary of the Army, as may be necessary for the purposes of navigation on the navigable waterway affected; and the operations of the Licensee, so far as they affect the use, storage and discharge from storage of waters affected by the license, shall at all times be controlled by such reasonable rules and regulations as the Secretary of the Army may prescribe in the interest of navigation, and as the Commission may prescribe for the protection of life, health, and property, and in the interest of the fullest practicable conservation and utilization of such waters for power purposes and for other beneficial public uses, including recreational purposes, and the Licensee shall release water from the project reservoir at such rate in cubic feet per second, or such volume in acre-feet per specified period of time, as the Secretary of the Army may prescribe in the interest of navigation, or as the Commission may prescribe for the other purposes hereinbefore mentioned.

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Article 13. On the application of any person, association, corporation, Federal agency, State or municipality, the Licensee shall permit such reasonable use of its reservoir or other project properties, including works, lands and water rights, or parts thereof, as may be ordered by the Commission, after notice and opportunity for hearing, in

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the interests of comprehensive development of the waterway or waterways involved and the conservation and utilization of the water resources of the region for water supply or for the purposes of steam-electric, irrigation, industrial, municipal or similar uses. The Licensee shall receive reasonable compensation for use of its reservoir or other project properties or parts thereof for such purposes, to include at least full reimbursement for any damages or expenses which the joint use causes the Licensee to incur. Any such compensation shall be fixed by the Commission either by approval of an agreement between the Licensee and the party or parties benefiting or after notice and opportunity for hearing. Applications shall contain information in sufficient detail to afford a full understanding of the proposed use, including satisfactory evidence that the applicant possesses necessary water rights pursuant to applicable State law, or a showing of cause why such evidence cannot concurrently be submitted, and a statement as to the relationship of the proposed use to any State or municipal plans or orders which may have been adopted with respect to the use of such waters.

Article 14. In the construction or maintenance of the project works, the Licensee shall place and maintain suitable structures and devices to reduce to a reasonable degree the liability of contact between its transmission lines and telegraph, telephone and other signal wires or power transmission lines constructed prior to its transmission lines and not owned by the Licensee, and shall also place and maintain suitable structures and devices to reduce to a reasonable degree the liability of any structures or wires falling or obstructing traffic or endangering life. None of the provisions of this article are intended to relieve the Licensee from any responsibility or requirement which may be im-

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- posed by any other lawful authority for avoiding or eliminating inductive interference.

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Article 15. The Licensee shall, for the conservation and development of fish and wildlife resources, construct, maintain, and operate, or arrange for the construction, maintenance, and operation of such reasonable facilities, and comply with such reasonable modifications of the project structures and operation, as may be ordered by the Commission upon its own motion or upon the recommendation of the Secretary of the Interior or the fish and wildlife agency or agencies of any State in which the project or a part thereof is located, after notice and opportunity for hearing.

Article 16. Whenever the United States shall desire, in connection with the project, to construct fish and wildlife facilities or to improve the existing fish and wildlife facilities at its own expense, the Licensee shall permit the United States or its designated agency to use, free of cost, such of the Licensee's lands and interests in lands, reservoirs, waterways and project works as may be reasonably required to complete such facilities or such improvements thereof. In addition, after notice and opportunity for hearing, the Licensee shall modify the project operation as may be reasonably prescribed by the Commission in order to permit the maintenance and operation of the fish and wildlife facilities constructed or improved by the United States under the provisions of this article. This article shall not be interpreted to place any obligation on the United States to construct or improve fish and wildlife facilities or to relieve the Licensee of any obligation under this license.

Article 17. The Licensee shall construct, maintain, and operate, or shall arrange for the construction, maintenance,

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and operation of such reasonable recreational facilities, including modifications thereto, such as access roads, wharves, launching ramps, beaches, picnic and camping areas, sanitary facilities, and utilities, giving consideration to the needs of the physically handicapped, and shall comply with such reasonable modifications of the project, as may be prescribed hereafter by the Commission during the term of this license upon its own motion or upon the recommendation of the Secretary of the Interior or other interested Federal or State agencies, after notice and opportunity for hearing.

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Article 18. So far as is consistent with proper operation of the project, the Licensee shall allow the public free access, to a reasonable extent, to project waters and adjacent project lands owned by the Licensee for the purpose of full public utilization of such lands and waters for navigation and for outdoor recreational purposes, including fishing and hunting: *Provided*, That the Licensee may reserve from public access such portions of the project waters, adjacent lands, and project facilities as may be necessary for the protection of life, health, and property.

Article 19. In the construction, maintenance, or operation of the project, the Licensee shall be responsible for, and shall take reasonable measures to prevent, soil erosion on lands adjacent to streams or other waters, stream sedimentation, and any form of water or air pollution. The Commission, upon request or upon its own motion, may order the Licensee to take such measures as the Commission finds to be necessary for these purposes, after notice and opportunity for hearing.

Article 20. The Licensee shall consult with the appropriate State and Federal agencies and, within one year of the date of issuance of this license, shall submit for Commission approval a plan for clearing the reservoir

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area. Further, the Licensee shall clear and keep clear to an adequate width lands along open conduits and shall dispose of all temporary structures, unused timber, brush, refuse, or other material unnecessary for the purposes of the project which results from the clearing of lands or from the maintenance or alteration of the project works. In addition, all trees along the periphery of project reservoirs which may die during operations of the project shall be removed. Upon approval of the clearing plan all clearing of the lands and disposal of the unnecessary material shall be done with due diligence and to the satisfaction of the authorized representative of the Commission and in accordance with appropriate Federal, State, and local statutes and regulations.

Article 21. Material may be dredged or excavated from, or placed as fill in, project lands and/or waters only in the prosecution of work specifically authorized under the license; in the maintenance of the project; or after obtaining Commission approval, as appropriate. Any such material shall be removed and/or deposited in such manner as to reasonably preserve the environmental values of the

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project and so as not to interfere with traffic on land or water. Dredging and filling in a navigable water of the United States shall also be done to the satisfaction of the District Engineer, Department of the Army, in charge of the locality.

Article 22. Whenever the United States shall desire to construct, complete, or improve navigation facilities in connection with the project, the Licensee shall convey to the United States, free of cost, such of its lands and rights-of-way and such rights of passage through its dams or other structures, and shall permit such control of its pools, as may

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be required to complete and maintain such navigation facilities.

Article 23. The operation of any navigation facilities which may be constructed as a part of, or in connection with, any dam or diversion structure constituting a part of the project works shall at all times be controlled by such reasonable rules and regulations in the interest of navigation, including control of the level of the pool caused by such dam or diversion structure, as may be made from time to time by the Secretary of the Army.

Article 24. The Licensee shall furnish power free of cost to the United States for the operation and maintenance of navigation facilities in the vicinity of the project at the voltage and frequency required by such facilities and at a point adjacent thereto, whether said facilities are constructed by the Licensee or by the United States.

Article 25. The Licensee shall construct, maintain, and operate at its own expense such lights and other signals for the protection of navigation as may be directed by the Secretary of the Department in which the Coast Guard is operating.

Article 26. Timber on lands of the United States cut, used, or destroyed in the construction and maintenance of the project works, or in the clearing of said lands, shall be paid for, and the resulting slash and debris disposed of, in accordance with the requirements of the agency of the United States having jurisdiction over said lands. Payment for merchantable timber shall be at current stumpage rates, and payment for young growth timber below merchantable size shall be at current damage appraisal values. However, the agency of the United States having jurisdiction may sell or dispose of the merchantable timber to others than the Licensee: *Provided, That* timber

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so sold or disposed of shall be cut and removed from the area prior to, or without undue interference with, clearing operations of the Licensee and in coordination with the Licensee's project construction schedules. Such sale or disposal to others shall not relieve the Licensee of responsibility for the clearing and disposal of all slash and debris from project lands.

Article 27. The Licensee shall do everything reasonably within its power, and shall require its employees, contractors, and employees of contractors to do everything reasonably within their power, both independently and upon the request of officers of the agency concerned, to prevent, to make advance preparations for suppression of, and to suppress fires on the lands to be occupied or used under the license. The Licensee shall be liable for and shall pay the costs incurred by the United States in suppressing fires caused from the construction, operation, or maintenance of the project works or of the works appurtenant or accessory thereto under the license.

Article 28. The Licensee shall interpose no objection to, and shall in no way prevent, the use by the agency of the United States having jurisdiction over the lands of the United States affected, or by persons or corporations occupying lands of the United States under permit, of water for fire suppression from any stream, conduit, or body of water, natural or artificial, used by the Licensee in the operation of the project works covered by the license, or the use by said parties of water for sanitary and domestic purposes from any stream, conduit, or body of water, natural or artificial, used by the Licensee in the operation of the project works covered by the license.

Article 29. The Licensee shall be liable for injury to, or destruction of, any buildings, bridges, roads, trails, lands,

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or other property of the United States, occasioned by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto under the license. Arrangements to meet such liability, either by compensation for such injury or destruction, or by reconstruction or repair of damaged property, or otherwise, shall be made with the appropriate department or agency of the United States.

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Article 30. The Licensee shall allow any agency of the United States, without charge, to construct or permit to be constructed on, through, and across those project lands which are lands of the United States such conduits, chutes, ditches, railroads, roads, trails, telephone and power lines, and other routes or means of transportation and communication as are not inconsistent with the enjoyment of said lands by the Licensee for the purposes of the license. This license shall not be construed as conferring upon the Licensee any right of use, occupancy, or enjoyment of the lands of the United States other than for the construction, operation, and maintenance of the project as stated in the license.

Article 31. In the construction and maintenance of the project, the location and standards of roads and trails on lands of the United States and other uses of lands of the United States, including the location and condition of quarries, borrow pits, and spoil disposal areas, shall be subject to the approval of the department or agency of the United States having supervision over the lands involved.

Article 32. The Licensee shall make provision, or shall bear the reasonable cost, as determined by the agency of the United States affected, of making provision for avoiding inductive interference between any project transmission line or other project facility constructed, operated, or

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maintained under the license, and any radio installation, telephone line, or other communication facility installed or constructed before or after construction of such project transmission line or other project facility and owned, operated, or used by such agency of the United States in administering the lands under its jurisdiction.

Article 33. The Licensee shall make use of the Commission's guidelines and other recognized guidelines for treatment of transmission line rights-of-way, and shall clear such portions of transmission line rights-of-way across lands of the United States as are designated by the officer of the United States in charge of the lands; shall keep the areas so designated clear of new growth, all refuse, and inflammable material to the satisfaction of such officer; shall trim all branches of trees in contact with or liable to contact the trans-

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mission lines; shall cut and remove all dead or leaning trees which might fall in contact with the transmission lines; and shall take such other precautions against fire as may be required by such officer. No fires for the burning of waste material shall be set except with the prior written consent of the officer of the United States in charge of the lands as to time and place.

Article 34. The Licensee shall cooperate with the United States in the disposal by the United States, under the Act of July 31, 1947, 61 Stat. 681, as amended (30 U.S.C. sec. 601, *et seq.*), of mineral and vegetative materials from lands of the United States occupied by the project or any part thereof: *Provided*, That such disposal has been authorized by the Commission and that it does not unreasonably interfere with the occupancy of such lands by the Licensee for the purposes of the license: *Provided further*, That in the event of disagreement, any question of unreasonable inter-

Order Issuing License and Dismissing Application, etc.

ference shall be determined by the Commission after notice and opportunity for hearing.

Article 35. If the Licensee shall cause or suffer essential project property to be removed or destroyed or to become unfit for use, without adequate replacement, or shall abandon or discontinue good faith operation of the project or refuse or neglect to comply with the terms of the license and the lawful orders of the Commission mailed to the record address of the Licensee or its agent, the Commission will deem it to be the intent of the Licensee to surrender the license. The Commission, after notice and opportunity for hearing, may require the Licensee to remove any or all structures, equipment and power lines within the project boundary and to take any such other action necessary to restore the project waters, lands, and facilities remaining within the project boundary to a condition satisfactory to the United States agency having jurisdiction over its lands or the Commission's authorized representative, as appropriate, or to provide for the continued operation and maintenance of nonpower facilities and fulfill such other obligations under the license as the Commission may prescribe. In addition, the Commission in its discretion, after notice and opportunity for hearing, may also agree to the surrender of the license when the Commission, for the reasons recited herein, deems it to be the intent of the Licensee to surrender the license.

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Article 36. The right of the Licensee and of its successors and assigns to use or occupy waters over which the United States has jurisdiction, or lands of the United States under the license, for the purpose of maintaining the project works or otherwise, shall absolutely cease at the end of the license period, unless the Licensee has obtained a new license pursuant to the then existing laws and

Order Issuing License and Dismissing Application, etc.

regulations, or an annual license under the terms and conditions of this license.

Article 37. The terms and conditions expressly set forth in the license shall not be construed as impairing any terms and conditions of the Federal Power Act which are not expressly set forth herein.

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IN TESTIMONY of its acknowledgment of acceptance of all of the provisions, terms and conditions of this license, City of Vanceburg, Kentucky, on this ____ day of _____, 1976, has caused its corporate name to be signed hereto by _____, its _____ President, and its corporate seal to be affixed hereto and attested by _____, its _____ Secretary, pursuant to a resolution of its Board of Directors duly adopted on the ____ day of _____, 19 ____, a certified copy of the record of which is attached hereto.

By _____
President

Attest:

Secretary

(Executed in quadruplicate)

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

CITY OF VANCEBURG, KENTUCKY } Project No. 2614

PETITION FOR REHEARING OF THE CITY OF
VANCEBURG, KENTUCKY

The City of Vanceburg, pursuant to § 313(a) and (c) of the Federal Power Act, and § 1.34 of the Commission's Rules of Practice and Procedure, hereby petitions rehearing in the above captioned matter and moves the Commission to make final its order issuing a license to Vanceburg, said order being dated March 29, 1976. Vanceburg further states as follows:

1. Said order in Article 56 (p. 38) requires Petitioner to pay to the United States certain annual charges. Petitioner states that said charges are not proper for the reason that Vanceburg is a municipal corporation of the Commonwealth of Kentucky and the Vanceburg Electric Light Heat and Power System is a corporate entity totally owned by the city pursuant to § 96.520 of the Kentucky Revised Statutes. As such it is a public non-profit body.

2. Vanceburg has an agreement with East Kentucky Power Cooperative (East Kentucky) for certain transmission service and firming up of power and sale of excess power out of said project to East Kentucky. East Kentucky is a generation and transmission cooperative all of whose eighteen members are distribution electric cooperatives in the Commonwealth of Kentucky, organized under Chapter 279 of the Kentucky Revised Statutes. East Ken-

Petition for Rehearing of the City of Vanceburg, Kentucky

tucky and all of its members are non-profit cooperatives and are exempt from Federal income tax under § 501(c) (12) of the Internal Revenue Code of 1954 as amended.

3. Appendix A of the order is further in error because it does not include consideration of the amount of power Vanceburg Electric Light Heat and Power System provides at no cost to the

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municipality of Vanceburg.

WHEREFORE Vanceburg prays:

1. The Commission grant rehearing in the matter herein for the reasons above stated, and
2. Moves the Commission to make final its order granting license herein to Vanceburg.

Respectfully submitted,

(s) Philip P. Ardery
Brown, Todd & Heyburn
1600 Citizens Plaza
Louisville, Kentucky 40202

(s) Marlow W. Cook
Shook, Hardy & Bacon
1776 K Street, N.W.
Washington, D.C. 20006
Counsel for City of Vanceburg

April 27, 1976

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

CITY OF VANCEBURG, KENTUCKY } Project No. 2614

**MOTION OF THE CITY OF VANCEBURG, KENTUCKY
TO SUPPLEMENT ITS PETITION FOR REHEARING**

The City of Vanceburg, Kentucky (Vanceburg) hereby moves the Commission to consider the following items as a supplement to its Petition for Rehearing, heretofore filed, and further states:

1. Vanceburg, pursuant to § 313(a) and (c) of the Federal Power Act, and § 1.34 of the Commission's Rules of Practice and Procedure, filed on April 27, 1976 a timely Petition for Rehearing in the above captioned matter.

2. The Commission's Order Issuing License (Major) and Dismissing Application for Preliminary Permit in this matter was issued on March 29, 1976. Vanceburg's consulting engineers, W. M. Lewis & Associates, Inc., of Portsmouth, Ohio, and Sogreah of Grenoble, France, made every effort to thoroughly review the technical details of the Order prior to the deadline for filing for rehearing but, due to principals of Lewis & Associates being involved in several matters before various state regulatory commissions and the inherent delay in exchange of correspondence with Grenoble, France, the engineers were unable to make a complete analysis of the Order prior to the filing for Rehearing on April 27.

3. After analysis of the Commission's Order by Vanceburg's consulting engineers, it appears appropriate and pertinent to the Commission's consideration that additional

Motion of City of Vanceburg to Supplement Petition, etc.
facts regarding Article 56 of the Order (page 38)—and particularly Appendix A which was attached to and made part of the Order—be presented.

4. Vanceburg is a municipal corporation of the Commonwealth of Kentucky and the Vanceburg Electric Light, Heat and Power System is a corporate entity totally owned by the City pursuant to § 96.520 of the Kentucky Revised Statutes. As such, neither Vanceburg nor Vanceburg Electric Light, Heat and Power System pays Federal or state income tax as does an investor-owned electric utility.

5. The construction of Appendix A properly did not consider income taxes. If it had, as would have been required if Applicant was an investor-owned utility, the factor of 0.1126 in item 1 of Appendix A may well have been 0.1326, assuming an amount of 2 percent for the effect of income taxes. Assuming this same premise, the factor of 0.1181 in item 2 of Appendix A would have been 0.1381. Using these factors, the estimated net power benefits in item 4 of Appendix A would have been

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\$80,800 instead of \$455,800. To illustrate this, a sample calculation is attached hereto. Thus, the annual charge in Article 56(ii) for the purpose of recompensing the United States for the utilization of the Government's Greenup Locks and Dam and appurtenant structures would be \$40,400.

6. Without giving consideration to the above, Vanceburg loses its advantage of being a municipality and owning and operating a municipal electric system for the benefit of its citizens.

7. Vanceburg filed as part of its Application for License an Economic Study wherein computations similar to those in Appendix A were provided. In this Study, Vanceburg delineated the individual items making up the annual

Motion of City of Vanceburg to Supplement Petition, etc.

costs which the Commission in Appendix A to its Order establishes as 11.26 percent for hydro and 11.81 percent for steam. Since these are different than the factors used by Vanceburg, it will be extremely helpful to Vanceburg's consulting engineers to know the breakdown of these percentages and therefore requests the Commission to make them available.

WHEREFORE, Vanceburg prays that the Commission sustain this Motion to add the foregoing facts as a supplement to Vanceburg's Petition for Rehearing and further prays that:

1. The Commission recalculate Appendix A of its Order, giving Vanceburg full advantage of its municipality status.

2. Article 56(ii) of Part (C) of the Commission's Order be modified to reflect the recalculated Estimated Net Power Benefits of Appendix A.

3. The calculations used by the Commission in Appendix A be made available to Vanceburg.

Respectfully submitted,

(s) Philip P. Ardery
Brown, Todd & Heyburn
1600 Citizens Plaza
Louisville, Kentucky 40202

(s) Marlow W. Cook
Shook, Hardy & Bacon
1776 K Street, N.W.
Washington, D.C. 20006
Counsel for City of Vanceburg

May 14, 1976

Motion of City of Vanceburg to Supplement Petition, etc.

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EXAMPLE OF CALCULATION TO ILLUSTRATE
EFFECT OF INCOME TAXES ON NET
POWER BENEFITS

Computation of Net Power Benefits,
Greenup Project No. 2614

	Appendix A to Order	Calculation Using 2% Annual Cost to Represent Effect of Income Taxes
1. Greenup Project No. 2614		
Installed Capacity 70.56 MW		
Est. Average Annual Generation 300 GWh		
Est. Dependable Capacity 37.5 MW		
Estimated Capital Cost (1/75) \$33,848,600		
Est. Power to be supplied U. S. Government		
Energy — 0.617 GWh		
Capacity — 0.375 MW		
Estimated Annual Cost (\$1,000)		
Fixed (\$33,848.6) x 0.1126	3811.4	x 0.1326 4488.3
O & M A & G	146.0	146.0
FPC Annual Charge	5.6	5.6
Total	3963.0	4639.9
2. Steam Electric Plant Alternative (2-500 MW Units w. Cooling Towers)		
Estimated Capital Cost (1/75)	\$/KW	
Steam Plant	393.74	
Transmission	49.70	
Total	413.44	
Estimated Annual Cost		
Fixed (\$413.44) x 0.1181	48.83	x 0.1381 57.10
O & M A & G	2.63	2.63
Fuel, fixed & inventory	4.72	4.72
Total	56.18	64.45
Estimated Variable Cost	7.91 mills/kwh	
3. Estimated Annual Value		
Capacity ¹ (36,877-375) kw x \$56.18/kw		
	= \$2,050,700	x \$64.45 = \$2,352,600
Energy (300,000-617) mwh x \$7.91/mwh		
	= \$2,368,100	= \$2,368,100
Total	\$4,418,800	\$4,720,700
4. Estimated Net Power Benefits		
\$4,418,800 — \$3,963 = \$455,800		
	\$4,720,700 — \$4,639,900 = \$	80,800
¹ Hydro adjustment	probability of meeting load-hydro	
dependable capacity	x probability of meeting load-steam	
		0.87771
	37,500 x	0.89257
		= 36,877

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

REHEARING

Before Commissioners: RICHARD L. DUNHAM, *Chairman*;
DON S. SMITH, JOHN H. HOLLO-
MAN III, and JAMES G. WATT.

CITY OF VANCEBURG, KENTUCKY } Project No. 2614

ORDER GRANTING REHEARING FOR THE PURPOSE
OF FURTHER CONSIDERATION

(Issued May 27, 1976)

On April 27, 1976, the City of Vanceburg, Kentucky (Vanceburg) filed a timely petition for rehearing of our Order of March 29, 1976, in which we issued a license to Vanceburg to construct, operate, and maintain the Greenup Project No. 2614. On May 14, 1976, Vanceburg filed a document entitled "Motion of the City of Vanceburg, Kentucky to Supplement its Petition for Rehearing."

The Commission finds:

It is appropriate and in the public interest to grant rehearing for the purpose of further consideration in connection with the above noted documents filed by Vanceburg.

The Commission orders:

Rehearing is hereby granted for the purpose of further consideration in connection with the above noted documents filed by Vanceburg.

By the Commission.

(SEAL)

Kenneth F. Plumb,
Secretary

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

REHEARING

Before Commissioners: RICHARD L. DUNHAM, *Chairman*;
 DON S. SMITH, JOHN H. HOLLO-
 MAN III, and JAMES G. WATT.

CITY OF VANCEBURG, KENTUCKY } Project No. 2614

ORDER ON REHEARING

(Issued June 21, 1976)

On April 27, 1976, the City of Vanceburg, Kentucky (Vanceburg) filed a timely petition for rehearing of our March 29, 1976, Order Issuing License (Major) and Dismissing Application for Preliminary Permit for the Greenup Projects Nos. 2614 and 2704. On May 14, 1976, Vanceburg filed a document entitled "Motion of the City of Vanceburg, Kentucky to Supplement its Petition for Rehearings". By order issued May 27, 1976, we granted rehearing for the purpose of further consideration in connection with these documents. These documents do not present any arguments in addition to those arguments which are set forth in the documents filed on April 27 and May 14, 1976, for the Cannelton Project No. 2245.

The Commission finds:

For the reasons set forth in our Order Denying Rehearing for the Cannelton Project No. 2245, the documents filed by the City of Vanceburg, Kentucky, present no facts or legal arguments that require any change in or modification

Order On Rehearing

of our order of March 29, 1976, issuing a license for Project No. 2614.

The Commission orders:

The documents filed by the City of Vanceburg, Kentucky, on April 27 and May 14, 1976, are hereby denied.
 By the Commission.

(S E A L)

Kenneth F. Plumb,
 Secretary.

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

REHEARING

Before Commissioners:

CITY OF VANCEBURG, KENTUCKY } Projects No. 2245, 2614

ORDER SUPPLEMENTING ORDERS ON REHEARING
 (Issued August 3, 1976)

On June 21, 1976, we issued separate Orders on Rehearing for the Cannelton Project No. 2245 and the Greenup Project No. 2614. It has come to our attention that these orders did not set out the individual items making up the 11.26 percent fixed cost figure (.1126) for the projects and the 11.81 percent fixed cost figure (.1181) for the steam plant alternative to the projects which were used in Appendix A of our March 29, 1976, orders in these proceedings. The City of Vanceburg, Kentucky (Vanceburg) requested this material in its May 14, 1976, Motion to Supplement Its Petition for Rehearing.

The Commission finds:

It is appropriate and in the public interest to provide the material requested by Vanceburg in its May 14, 1976, motion by supplementing our June 21, 1976, orders on rehearing.

The Commission orders:

The orders on rehearing of June 21, 1976, for these projects are hereby supplemented with the material set forth in Appendix A of this order.

By the Commission.

(SEAL)

Kenneth F. Plumb.
 Secretary.

Order Supplementing Orders on Rehearing

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APPENDIX A

Fixed Charge Rates Used in Computation of Annual
 Charges for Use of Government Dam
 Projects Nos. 2245 & 2614

	Hydro. Project	Steam Plant Alternatives
Cost of Money	10.80%	10.80%
Amortization	0.06 ¹	.31 ¹
Interim Replacements	0.20	.35
Insurance	0.10	.25
State & Local Taxes	—	—
Federal Income Tax	—	—
Misc. Tax	0.10	0.10
Total Fixed Charge Rate	11.26%	11.81%

¹Based on 50 years for hydro and 35 years for Steam Plant.

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

September Term, 1977

**No. 76-1755
(and Consolidated Case No. 76-1756)**

CITY OF VANCEBURG, KENTUCKY - - - *Petitioner*

v.

FEDERAL ENERGY REGULATORY COMMISSION - *Respondent*

BEFORE: Bazelon, Chief Judge; Tamm and Wilkey, Circuit Judges.

ORDER DENYING REHEARING—Filed
December 22, 1977

Upon consideration of the petition for rehearing filed by petitioner City of Vanceburg, Kentucky, it is

ORDERED by the Court that petitioner's aforesaid petition is denied.

Per Curiam
For the Court:
(s) GEORGE A. FISHER
Clerk

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

September Term, 1977

**No. 76-1755
(and Consolidated Case No. 76-1756)**

CITY OF VANCEBURG, KENTUCKY - - - *Petitioner*

v.

FEDERAL ENERGY REGULATORY COMMISSION - *Respondent*

BEFORE: Bazelon, Chief Judge; Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, Circuit Judges.

**ORDER DENYING SUGGESTION FOR REHEARING
EN BANC**—Filed December 22, 1977

The suggestion for rehearing *en banc* filed by petitioner City of Vanceburg, Kentucky, having been transmitted to the full Court and no Judge having requested a vote with respect thereto, it is

ORDERED by the Court *en banc* that petitioner's aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam
For the Court:
(s) GEORGE A. FISHER
Clerk